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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

NO. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, *et al.*,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Second Circuit

Date 1968		
March	15	Motion for Leave to Proceed in Forma Pauperis
"	15	Affidavit in Opposition to Motion
"	18	Record was filed
Apr.	2	Order denying Motion for Leave to file Forma Pauperis
Oct.	4	Motion to Dismiss Appeal
"	7	Affidavit in Opposition to Motion
"	7	Order denying Motion

Docket Entries

Date		
1969		
Feb.	24	Opinion and Judgment of the Court
Mar.	11	Petition for Rehearing
"	18	Order denying Rehearing

United States District Court for the Western District of New York.

Date		
1967		
Jan.	23	Filed Complaint and Demand for Jury Trial
"	23	Issued Summons, 2 dup. orig. & 9 copies
Feb.	1	Filed summons-served 1/26/67 Erie Lackawanna RR Co., Henry J. Czosek, Local #826; Fred R. McKernan & Anthony E. Matz-not served
Mar.	10	Filed summons-served 3/6/67 System Federation No. 78 & 100
Apr.	20	Filed Deft's Henry J. Czosek, Edward P. McEntee, System Federation No. 78 & 100, Motion to Dismiss, ret. 5/8/67
"	20	Filed Deft's Erie Lackawanna RR Co., Notice of Motion & Motion to Dismiss Complaint-ret. 5/29/67-dec. res.
1968		
Jan.	11	Filed Decision & Order dismissing complaint-Henderson, J. (notice & copy to Messrs. Lipsitz, Griffin and Shea)

Docket Entries

Feb.	5	Filed Pltf's Notice of Appeal (copy mailed to Messrs. Lipsitz and Griffin)

COMPLAINT

(Filed January 23, 1967)

UNITED STATES DISTRICT COURT
For The Western District of New York

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD and WALTER DALY,
Plaintiffs,

vs.

ERIE LACKAWANNA RAILROAD COMPANY; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; ANTHONY E. MATZ, International President, International Brotherhood of Firemen and Oilers; FRED R. McKERNAN, General Chairman, System Council No. 2, International Brotherhood of Firemen and Oilers; HENRY J. CZOSEK, Chairman Local No. 826, International Brotherhood of Firemen and Oilers; SYSTEM COUNCIL NO. 2, International Brotherhood of Firemen and Oilers; LOCAL NO. 826; SYSTEM FEDERATION NO. 78; and SYSTEM FEDERATION NO. 100,

Defendants.

Civil 1967-30

Complaint

FIRST: At all times hereinafter mentioned, Plaintiffs were and are citizens of the State of New York and the Defendant, Anthony E. Matz is a citizen of the State of Pennsylvania and the Defendant, International Brotherhood of Firemen and Oilers is a membership association having its principal place of business in a state other than New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

Complaint

SECOND: The action arises under the Interstate Commerce Act 49 USCA Sect. 5 *et seq.* The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

THIRD: This action arises under the Railroad Labor Act 45 USCA Sect. 151 *et seq.* The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

FOURTH: Plaintiffs herein were members of Local No. 826, System Federation No. 78 and System Council No. 2 of the International Brotherhood of Firemen and Oilers in the year 1962 and for a number of years prior thereto.

FIFTH: Plaintiffs herein were employed as stationary engineers of the Delaware, Lackawanna and Western Railroad in the year 1960 and for some years prior thereto and at the time the merger of the Erie Railroad and the Delaware, Lackawanna and Western Railroad was authorized by the Interstate Commerce Commission in September of 1960; Plaintiffs continued in their employment for the newly formed Erie Lackawanna Railroad Company.

SIXTH: The Plaintiffs remained in said employment until June 1962 when they were furloughed and never recalled having been replaced by "pre-merger" employees of the Erie Railroad.

SEVENTH: The furloughing of the Plaintiffs by the Erie, Lackawanna Railroad Company in 1962 and their subsequent replacement, was in effect, a termination of the employment relation by way of a discharge.

EIGHTH: The wrongful discharge of the Plaintiffs was a direct result of the merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad and in contravention of the Interstate Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie, Lackawanna Railroad Company as a result of their loss of employment.

Complaint

NINTH: The discharge of the Plaintiffs was a result of the merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad in contravention of the Implementing Agreement between the Erie, Lackawanna Railroad Company and its employees represented by System Federation No. 78 and System Federation No. 100, supplementing and implementing the Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie, Lackawanna Railroad Company as a result of their loss of employment.

TENTH: That contrary to the Railroad Labor Act 45 USCA Sect. 151 *et seq.* the Defendant Erie, Lackawanna Railroad Company not only failed to give Plaintiffs thirty (30) days written notice of intended change in working conditions, but also failed to give any notice of said change.

ELEVENTH: That the Plaintiffs repeatedly requested the Defendant International Brotherhood of Firemen and Oilers and its president, Anthony E. Matz, Defendants, System Council No. 2, System Federation No. 78 and System Federation No. 100 and their general chairman, Fred R. McKernan, and Defendant, Local No. 826 and its chairman, Henry J. Czosek, to process their claims against the Erie, Lackawanna Railroad Company and the aforementioned union, its officers and affiliates have been guilty of gross nonfeasance and hostile discrimination in their arbitrary and capricious refusal to process said claims, all to the detriment and damage of Plaintiffs.

TWELFTH: That the Defendant International Brotherhood of Firemen and Oilers and its president, Anthony E. Matz, Defendants System Council No. 2, System Federation No. 78, System Federation No. 100 and their general chairman, Fred R. McKernan, and Defendant Local No. 826 and its chairman, Henry J. Czosek, have breached their duty and have discriminated against the rights of

the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiffs' loss of employment and the resulting loss of compensation therefrom.

THIRTEENTH: Plaintiffs demand a trial by jury on all issues presented herein.

WHEREFORE, Plaintiffs demand judgment against Defendant Erie, Lackawanna Railroad Company or, International Brotherhood of Firemen and Oilers or Anthony E. Matz, System Council No. 2, System Federation No. 78 and System Federation No. 100, or Fred R. McKernan or, Local No. 826 or Henry J. Czosek, or against all in the sum of One Hundred Sixty Thousand Dollars ($160,000.00) and Costs and for such other and further relief as this Court deems just and proper.

Motion by Union Defendants to Dismiss Complaint

(Filed April 19, 1967)

[Title omitted in printing]

Now come defendants Henry J. Czosek, Henry J. Czosek as Chairman, Local Lodge 826 of the International Brotherhood of Firemen and Oilers, Local No. 826, Edward P. McEntee, System Federation No. 78, and System Federation No. 100, and respectfully move the Court to dismiss the complaint of the plaintiffs herein on the grounds that the Court lacks jurisdiction of the subject matter of the action, and that the complaint fails to state a claim upon which relief can be granted, and in support of said motion state as follows:

1. No facts are pleaded to support the asserted amount in controversy, there is no diversity of citizenship between all of the plaintiffs and all of the defendants, and there are no other allegations showing this Court's jurisdiction over the matters complained of.

2. By an Act of Congress known as the Railway Labor Act (45 U. S. C., Sec. 151 *et seq.*) jurisdiction over grievances and contract claims of railroad employees, such as those here asserted, has been withdrawn from the courts, both state and federal, and vested exclusively in the National Railroad Adjustment Board.

3. The complaint fails to allege, either verbatim or in substance, the provisions of any contract or statute upon which plaintiffs rely, and for breach of which this action may be maintained.

4. Although plaintiffs assert the conclusion that they were wrongfully discharged, it affirmatively appears from the complaint that they were not discharged.

Motion by Union Defendants to Dismiss Complaint

5. The complaint fails to allege resort to or exhaustion of plaintiffs' contractual and statutory administrative remedies.

6. The complaint fails to allege any action by these defendants resulting in injury or damage to plaintiffs for which this action may be maintained.

RICHARD LIPSITZ,
One Niagara Square,
Buffalo, New York 14202

RICHARD R. LYMAN,
741 National Bank Building,
Toledo, Ohio 43604

Attorneys for Defendants, Henry J. Czosek and Henry J. Czosek as Chairman, Local Lodge 826, *Edward P. McEntee for System Federation No.* 78 *and Edward P. McEntee for System Federation No.* 100.

Of Counsel:
Lipsitz, Green, Fahringer,
Roll, Schuller & James,
One Niagara Square,
Buffalo, New York 14202.

Mulholland, Hickey & Lyman,
741 National Bank Bldg.
Toledo, Ohio 43604.

Motion by Defendant Railroad to Dismiss Complaint.

To:

Flaherty & Shea,
Attorney for Plaintiffs,
Office and P. O. Address,
2010 Liberty Bank Building,
Buffalo, New York 14202.

Mullholland, Hickey & Lyman,
Attorneys for Defendants Other
than Erie Lackawanna Railroad Company,
Office and P. O. Address,
741 National Bank Building,
Toledo, Ohio.

Lipsitz, Green, Fahringer, Roll,
Schuller & James,
Attorneys for Defendants Other than
Erie Lackawanna Railroad Company,
Office and P. O. Address,
1 Niagara Square,
Buffalo, New York 14202.

Motion by Defendant Railroad to Dismiss Complaint

(Filed April 20, 1967)

[Title omitted in printing]

Defendant Erie Lackawanna Railroad Company respectfully moves the Court, under Rule 12 of the Federal Rules of Civil Procedure, for an order dismissing the complaint against it upon the ground that the Court lacks jurisdiction over the subject matter and the complaint herein fails to state a claim upon which relief can be granted,

and in support of the motion represents to the Court that the complaint shows on its face that the controversy described therein is one governed by the *Railway Labor Act*, 45 U. S. C. A. Section 151 *et seq.*, and the complaint does not allege that the plaintiffs have exhausted the administrative remedies available to them and it does not allege that the plaintiffs have received an award from the National Railroad Adjustment Board both of which are conditions precedent to a cause of action and jurisdiction of this Court. Submitted herewith is the affidavit of Richard F. Griffin, sworn to April 20, 1967, in support of the motion and the grounds upon which it is made. Upon the return date of this motion the defendant Erie Lackawanna Railroad Company will move the Court for such other and further relief as the Court may deem just and proper.

Dated: Buffalo, New York,
April 20, 1967.

MOOT, SPRAGUE, MARCY,
LANDY & FERNBACH,

By Richard F. Griffin,
A Member of the Firm,
Attorneys for Defendant Erie Lackawanna Railroad Company,
400 Erie County Savings Bank Building,
Buffalo, New York 14202.

Affidavit of Richard F. Griffin in Support of Motion of Defendant Railroad

[Title omitted in printing]

State of New York,
County of Erie,
City of Buffalo. } ss.:

RICHARD F. GRIFFIN, being duly sworn, deposes and says that he is a member of the firm of Moot, Sprague, Marcy, Landy & Fernbach, attorneys for the defendant Erie Lackawanna Railroad Company, and submits this affidavit in support of the motion of the defendant Erie Lackawanna Railroad Company for an order dismissing the within action as against the Erie Lackawanna Railroad Company on the grounds that the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

That as it more fully appears from the complaint, the plaintiffs allege to have been wrongfully discharged by the defendant Erie Lackawanna Railroad Company in 1962.

It is not clear from plaintiffs' complaint the basis upon which the jurisdiction of this Court is deemed to exist. The defendant Erie Lackawanna Railroad Company is a New York domestic corporation, and the plaintiffs each allege that they are citizens of the State of New York. Accordingly, there is no diversity between the plaintiffs and the defendant Erie Lackawanna Railroad Company.

That the complaint further alleges in paragraphs Second and Third that the action arises under the Interstate Commerce Act and under the Railway Labor Act. Your

deponent is not aware of any basis of jurisdiction under the Interstate Commerce Act and respectfully submits to the Court that under the *Railway Labor Act*, 45 U. S. C. A. 151 *et seq.*, the District Court only has jurisdiction after a railroad employee has exhausted his administrative remedies and procedures and after he has an award from the National Railroad Adjustment Board with which the defendant railroad refuses to comply.

The plaintiffs' complaint does not allege the exhaustion of administrative remedies nor does it allege that the plaintiffs have received an award from the N. R. A. B. with which the defendant railroad refuses to comply.

Upon information and belief, the plaintiffs were employed by the defendant Erie Lackawanna Railroad Company in connection with the Michigan Avenue power plant, Buffalo, New York, and their work came to an end on or about June 2, 1962 due to the closing down of the Michigan Avenue power plant because of its obsolescence. Upon information and belief, thereafter on or about December 26, 1962 the plaintiffs requested Master Mechanic C. E. Maahs of the defendant Erie Lackawanna Railroad Company to review the matter, and on or about February 20, 1963 were advised by letter from the said C. E. Maahs that any claim was denied. Upon information and belief, no further action was taken by plaintiffs as against the defendant Erie Lackawanna Railroad Company until on or about January 23, 1967 when the complaint was filed herein.

Your deponent respectfully prays for an order of the Court dismissing the action upon the grounds that plain-

tiffs have not perfected any rights by exhausting their administrative remedies nor have they received an award of the N. R. A. B. both of which are conditions precedent to a cause of action and jurisdiction of this case.

RICHARD F. GRIFFIN.

Subscribed and sworn to before me
this 20th day of April, 1967.
Caesar J. Naples,
Notary Public, State of New York,
Qualified in Erie County,
My Commission Expires March 30, 1969.

Affidavit of James P. Shea in Opposition to Motions of Union Defendants and Defendant Railroad

[Title omitted in printing]

State of New York,
County of Erie,
City of Buffalo. } ss.:

JAMES P. SHEA, being duly sworn, deposes and states that he is a member of the law firm of Flaherty & Shea, attorneys for the Plaintiffs herein, and submits this affidavit in opposition to the motions made by all the defendants herein to dismiss the complaint.

That there are three separate and distinct claims set forth in the complaint and may be described briefly as follows:

(1) Against the Erie Lackawana Railroad Company for wrongful discharge.

(2) Against the Unions for breach of the duty of fair representation and with the Railroad joined in this claim as a necessary party.

(3) Against the Railroad for their failure to grant the plaintiffs their rights under the Interstate Commerce Act and under the Interstate Commerce Commission order allowing the merger.

That the plaintiffs do not have to allege facts or damages in their complaint under the Federal Rules.

That the National Railroad Adjustment Board does not have exclusive jurisdiction in claims involving wrongful discharge by Railroads and the National Railroad Adjustment Board has no jurisdiction whatsoever in claims wherein it is asserted a violation of rights under a federal statute and Commission order.

Affidavit of James P. Shea in Opposition to Motions of Union Defendants and Defendant Railroad

WHEREFORE, your deponent respectfully requests that this Court grant an Order denying the motions made by the respective defendants herein and for such other and further relief as the Court may deem just and proper.

Dated: Buffalo, New York.
May 25th, 1967.

FLAHERTY & SHEA,
(James P. Shea, of counsel),
Attorneys for Plaintiffs,

2010 Liberty Bank Building,
Buffalo, New York 14202,
852-6896.

DECISION AND ORDER OF DISTRICT COURT

(Issued January 10, 1968, Entered January 11, 1968)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. O'MARA; GEORGE McCORMICK; JULIUS PACKARD; and WALTER DALY,
Plaintiffs

—vs— CIVIL 1967-30

ERIE LACKAWANNA RAILROAD COMPANY; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; ANTHONY E. MATZ, International President, International Brotherhood of Firemen and Oilers; FRED R. McKERNAN, General Chairman, System Council No. 2, International Brotherhood of Firemen and Oilers; HENRY J. CZOSEK, Chairman Local No. 826. International Brotherhood of Firemen and Oilers; SYSTEM COUNCIL NO. 2, International Brotherhood of Firemen and Oilers, LOCAL NO. 826; SYSTEM FEDERATION NO. 78; and SYSTEM FEDERATION NO. 100,
Defendants.

Lipsitz, Green, Fahringer, Roll, Schuller & James (Richard Lipsitz, Esq., of Counsel, Buffalo, New York, Attorney for Defendants Henry J. Czosek, Henry J. Czosek as

Chairman, Local Lodge 826, and Edward P. McEntee.
Moot, Sprague, Marcy, Landy & Fernbach (Richard F. Griffin, Esq., of Counsel), Buffalo, New York, Attorneys for Defendant Erie Lackawanna Railroad Company.

Flaherty & Shea (James P. Shea, Esq., of Counsel), Buffalo, New York, Attorneys for Plaintiffs.

The plaintiffs are members of Local 826, System Federation No. 78 and Council No. 2 of the International Brotherhood of Firemen and Oilers. They were originally employed as stationary engineers of the Delaware, Lackawanna & Western Railroad. In September of 1960, however, the Interstate Commerce Commission authorized the merger of the Delaware, Lackawanna & Western Railroad with the Erie Railroad into the present Erie Lackawanna Railroad. Thereafter, in June of 1962, the plaintiffs were furloughed from their employment and replaced by pre-merger employees of the Erie Railroad.

The plaintiffs commenced this action seeking damages alleged to flow from their loss of employment. Before the court are motions by the defendants, who have been served in this action, to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim for which relief can be granted.

Decision and Order of District Court

Inasmuch as diversity of citizenship clearly is lacking as among the parties, jurisdiction may not be predicated upon that ground. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 65, 71 (1939), *American Fire & Cas. Co.*, vs *Finn*, 341 U. S. 617 (1951). The plaintiffs argue, however, that the action may be sustained either as a suit for wrongful discharge or as a suit based upon hostile discrimination.

Assuming, without deciding, that the complaint may be viewed as a discharge grievance subject to arbitration under the Railway Labor Act (45 U. S. C. §§151 et seq.), the action would be governed by the principles set forth in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). *Walker* v. *Southern Ry. Co.*, 385 U.S. 196 (1966). These decisions permit an aggrieved railroad employee to elect to treat his discharge as final without exhausting his administrative remedies when, and only when, diversity jurisdiction exists and such exhaustion is not required under applicable state law. See *Larson* v. *American Air Lines, Inc.*, 313 F. 2d 599, 602 (2d Cir. 1963); *Walters* v. *Chicago & Northwestern Ry. Co.*, 216 F. 2d 332, 335-336 (7th Cir. 1954). Here, not only is diversity jurisdiction lacking, but it also seems clear that the New York courts would require exhaustion. See *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570 (2d Cir. 1967). The complaint does not allege, and in opposition to this motion the plain-

tiffs have not claimed that they have exhausted their administrative remedies.

Although the plaintiffs use the phrase "hostile discrimination" in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro v. Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961).

Finding no basis for federal jurisdiction, the complaint is dismissed. So ordered.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

DATED: Jan. 10, 1968.

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 211—September Term, 1968.

(Argued December 4, 1968 Decided February 24, 1969.)

Docket No. 32184

John R. O'Mara, George McCormick
Julius Packard and Walter Daly,
Plaintiffs-Appellants

—v.—

Erie Lackawanna Railroad Company, International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee,
Defendants-Appellees.

B e f o r e:

Lumbard, *Chief Judge*, Friendly, *Circuit Judge*, and Frankel, *District Judge*.*

Appeal from an order of the District Court for the Western District of New York, Henderson, J., granting defendant's motion to dismiss the complaint for lack of federal jurisdiction.

Reversed and remanded.

* Sitting by designation

James P. Shea, Buffalo, N.Y. (Flaherty & Shea, on the brief), *for plaintiffs-appellants.*

Richard F. Griffin, Buffalo N.Y. (Moot, Sprague, Marcy, Landy & Fernbach, and Courtland R. LaVallee, on the brief), *for appellee, Erie Lackawanna Railroad Company.*

Richard R. Lyman, Toledo, Ohio (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo N. Y., and Mulholland, Hickey & Lyman, Toledo, Ohio, on the brief), *for defendants-appellees Henry J. Czosek, Henry J. Czosek as Chairman, etc., and Edward P. McEntee, etc.*

Lumbard, *Chief Judge*:

Plaintiffs brought this action in the District Court for the Western District of New York seeking damages for their allegedly wrongful discharge, without compensation, from employment as stationary engineers with the Erie Lackawanna Railroad. Joined as defendants with the Railroad are the International Brotherhood of Firemen and Oilers and several of its affiliates and officers. The complaint alleged that the union defendants had been guilty of "hostile discrimination" in refusing to process plaintiffs' grievances against the Railroad.

The district court granted defendants' motion to dismiss the complaint, finding no basis for federal jurisdiction.

We reverse. We hold that the complaint, read in the generous spirit appropriate under the Federal Rules, states a federal claim against the union for breach of its duty of fair representation. On remand we grant plaintiffs leave to amend their complaint, if they can, to state a cause of

action against the Railroad based on its having acted with knowledge of the union's discrimination. *Glover* v. *St. Louis-San Francisco Ry. Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969); *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847 (2d Cir. 1961).

Prior to 1960 the plaintiffs were employed by the Delaware, Lackawanna & Western Railroad as stationary engineers in a power plant in Buffalo, New York. In that year the Delaware merged with the Erie Railroad, with the approval of the Interstate Commerce Commission, forming the present defendant Erie Lackawanna line. Plaintiffs were continued in their former positions by the merged line until 1962, when they were furloughed.

The complaint is very grudging in its recitation of the claims upon which federal jurisdiction is invoked. It is alleged that the 1962 furlough constituted a discharge of plaintiffs since they were never recalled and were in fact replaced by employees who had worked for the Erie Railroad before the merger. The complaint then claims that the discharges were the direct result of the 1960 merger, and violated "the Interstate Act 49 USCA Sect. 5 et seq." and the "Implementing Agreement" between the Erie Lackawanna and its employees represented by defendant unions. A violation of the Railway Labor Act, 45 U.S.C.A. §151 *et seq.*, is also alleged in that the Railroad failed to give the required 30 days written notice of an intended change in working conditions prior to the discharge of the plaintiffs.

Finally it is alleged that plaintiffs repeatedly requested the defendant unions and their officials to process their claims against the Railroad, but that these defendants "have been guilty of gross nonfeasance and hostile discrimi-

nation in their arbitrary and capricious refusal to process said claims," and "have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiff's loss of employment and the resulting loss of compensation therefrom." The prayer is for judgment in the sum of $160,000 against any or all of the defendants.

The district court was correct, on the allegations before it, in dismissing the portion of the complaint claiming a violation of the Implementing Agreement by the Railroad in discharging plaintiffs. It is settled that such a contract dispute between employees and a railroad falls within the primary jurisdiction of the National Railroad Adjustment Board, 45 U.S.C. §153 First (i). See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U. S. 30, 34-35, 39 (1957); *Walker* v. *Southern R. R. Co.*, 385 U. S. 196, 198 (1966). It follows that plaintiffs cannot maintain an action for damages under federal law since their complaint does not allege that they have exhausted their remedy before the Board. The union's refusal to process their grievances does not excuse plaintiff's failure to exhaust since individual employees have standing to prosecute their own grievances before the Board, 45 U.S.C. §153 First (j); cf. *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570, 572 (2d Cir. 1967). Nor is this conclusion altered by the allegation that the Railroad failed to give to the union the 30 days notice of a change in working conditions required by 45 U. S. C. §156. See *Hudie* v. *Aliquippa & Southern Railroad Co.*, 249 F. Supp. 210,

212 (W. D. Pa.), *aff'd per curiam* 360 F. 2d 213 (3rd Cir. 1966).

Ostensibly the complaint alleges that the Railroad's action was wrongful in two distinct respects, i. e., that it violated the Implementing Agreement between the Railroad and the union, and that it violated the Interstate Commerce Act. In reality, however, it appears that the basis of both these claims lies in the Implementing Agreement, and that therefore the doctrine of exhaustion of administrative remedies is fatal to both claims.

On appeal we are informed that the section of the Act relied upon is 49 U. S. C. §5 (2) (f),[1] which provides certain

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1 49 U. S. C. §5(2) (f) provides:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

safeguards for employees affected by a railroad merger. The Supreme Court has ruled that this section does not prevent the discharge of employees as a result of a merger, but rather relates only to questions of compensation. *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U. S. 169 (1961). The complaint provides us with no indication that plaintiffs are attacking any action taken by the Interstate Commerce Commission under §5(2) (f), nor does it allege in what respect the section has been violated. The section does authorize a railroad and union to enter into an agreement protecting the interests of workers affected by a merger. To the extent that plaintiffs have been wronged it appears to have been through a misapplication of the Implementing Agreement. Thus once again we have the type of employee-employer contract dispute which under federal law must be submitted first to the Railroad Adjustment Board and not to the courts. Cf. *Arnold* v. *Louisville & Nashville R. R. Co.,* 180 F. Supp. 429 (M. D. Tenn. 1960), *aff'd sub nom. Batts* v. *Louisville & Nashville R. R. Co.,* 316 F. 2d 22 (6th Cir. 1963). Dismissal of this portion of the complaint was proper, in addition, because it did not give defendants "fair notice" of the basis of plaintiffs' claim under the Act. *Conley* v. *Gibson,* 355 U. S. 41, 47 (1957).

But we think that a different result is required concerning the portion of the complaint which alleges "hostile discrimination" on the part of the union defendants in refusing to process plaintiffs' claims against the railroad. In *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192, 203 (1944), the Supreme Court held that the Railway Labor Act imposes upon unions a duty to represent fairly, without "hostile discrimination," all workers within a bargain-

ing unit. Since a charge by an employee against a union for a violation of this duty does not involve a dispute between "an employee or group of employees and a carrier or carriers," 45 U. S. C. §153 First (i), it does not fall within the jurisdiction of the Railroad Adjustment Board. Therefore it may be the basis of a suit in a federal district court. *Conley v. Gibson*, 355 U. S. 41 (1957); *Cunningham* v. *Erie Railroad Co.*, 266 F. 2d 411, 414-16 (2d Cir. 1959).

This is true even where the claim of hostile discrimination is based on the union's failure to process a grievance and it is clear that the employees themselves could have carried their grievance to the Adjustment Board. The Supreme Court has held that this right to process a grievance personally cannot excuse a union's refusal to fulfill its duty of fair representation, for the union is in a far better position successfully to process a grievance than are individual workers. *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). Thus, we disagree with the district court and hold that plaintiffs need not establish that they "could not personally press their rights under the collective bargaining agreement" in order to maintain this action against the union.

The only real question is whether the complaint's allegation of "hostile discrimination" is so unexplicated that it fails to give union defendants fair notice of the ground of plaintiffs' claim. The only hint concerning the nature of the discrimination is the complaint's statement that plaintiffs were replaced by " 'pre-merger' employees of the Erie Railroad."

The complaint does not make clear the basic reason why the plaintiffs are aggrieved, as stated to us upon the argument of the appeal, namely, that the union defendants are under the influence of the former employees of the Erie

Railroad and as a result are not representing fairly the interests of the former employees of the Delaware, Lackawanna & Western Railroad in the merged line. It is settled that such a claim of political discrimination states a good cause of action under the Railway Labor Act. *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961).

While we do not think that this basis of the claim can be fairly inferred from the face of the complaint, by the exercise of the liberal pre-trial and discovery devices available to them the defendants will be able to dispel any possible prejudice to them arising from the very broad nature of the allegations. See *Conley* v. *Gibson*, 355 U. S. 41, 47-48 (1957). Particularly in suits of this kind, where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed whenever possible to avoid dismissals based on technical deficiencies in the specificity of the allegations. At the least a plaintiff should be given the opportunity to file supplemental pleadings unless it appears "beyond doubt" that he cannot state a good cause of action. *Cf. Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957).

On remand we hold plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad, if they can, within the doctrine of *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961). There we suggested that, in a suit against a union for "hostile discrimination" the employer can be joined as a party defendant if it "acted from a motive to discriminate or with knowledge that the [union] was discriminating." 296 F. 2d at 851. Where the employer's action is only a consequence of the union's discriminatory conduct, *e. g.*,

Cunningham v. *Erie Railroad Co.*, 266 F. 2d 411 (2d Cir. 1959), or takes the form of joint discrimination with the union, then plaintiffs should be allowed to join the employer and the union in one action. *Glover* v. *St. Louis-San Francisco Ry Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969). And since the dispute draws its basic character from the union's violation of its duty of fair representation, recourse to the Railroad Adjustment Board should not be required insofar as the employer is fairly alleged to be implicated in the union's illegal conduct. *Id.*, 37 U. S. L. W. at 4085-86.

But dismissal of the employer from this suit will be proper if it appears that its action furloughing the plaintiffs, and the union's discriminatory refusal to process grievances concerning these furloughs, were not part of a combined attempt to discriminate. In that event plaintiffs' complaint against the Railroad would concern a violation of their rights under the collective bargaining agreement and this, as discussed above, falls within the exclusive primary jurisdiction of the Adjustment Board.

The order of the district court is reversed and the complaint against the union is reinstated, with leave to the plaintiffs to amend the complaint to state a cause of action against the Railroad. If plaintiffs are unable so to amend then the complaint against the Railroad should be dismissed.

JUDGMENT OF COURT OF APPEALS

(Entered February 24, 1969)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February, one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. MARVIN E. FRANKEL,
District Judge.

John R. O'Mara, George McCormick, Julius Packard and Walter Daly,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

ORDER OF COURT OF APPEALS DENYING REHEARING

(Entered March 18, 1969)

32184

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

John R. O'Mara, George McCormick,
Julius Packard and Walter Daily,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Company,
et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee, appellees herein.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

/s/ J. Edward Lumbard
U. S. C. J.
Marvin E. Frankel
U. S. D. J.

Supreme Court of the United States

No. 234 ---- , *October Term, 19* 69

Henry J. Cacsek, et al.,

Petitioners,

v.

John R. O'Mara, et al.

ORDER ALLOWING CERTIORARI. Filed October 13 -------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED

JUN 13 1969

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 234

HENRY J. CZOSEK, et al.,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO.

HENRY J. CZOSEK, et al.,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 24, 1969, rehearing denied March 18, 1969.

[1] The petitioners are Henry J. Czosek, Henry J. Czosek as Chairman, Local Lodge 826 of the International Brotherhood of Firemen and Oilers, Local No. 826, Edward P. McEntee, System Federation No. 78, and System Federation No. 100. The International Brotherhood of Firemen and Oilers, listed as one of the defendants-appellees in the caption of the proceedings below, was not served with summons and did not appear in the courts below.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix C, is reported at 407 F. (2d) 674. The decision and order of the District Court, printed in Appendix D, is not reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered February 24, 1969. (Appendix A.) Rehearing was denied by the Court of Appeals March 18, 1969. (Appendix B.) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. May an action for damages brought by railroad employees against their employer for alleged wrongful discharge, and against their union and its representatives for failure to process their claims against the railroad, be dismissed as to the railroad on the ground of exclusive jurisdiction in the National Railroad Adjustment Board, but continue to be maintained as a "fair representation" case against the union and recovery sought solely from it, where the damages claimed stem from the alleged wrongful discharge by the employer in breach of the collective bargaining agreement, independent of any conduct by the Union?

2. May railroad employees maintain an action against their union for failure to process their grievances without exhausting their administrative remedies, when there is no showing that it would have been futile for them to do so, and no claim is made that they could not personally press their rights under the collective bargaining agreement and before the National Railroad Adjustment Board?

3. Is a proper claim for violation of a union's duty of fair representation stated by a complaint which fails to

allege any facts which would constitute hostile discrimination by the union, or furnish any basis from which such hostile discrimination could reasonably be inferred?

STATUTES INVOLVED

The statutory provisions principally involved are Sections 3 First (i), (j) and (m) of the Railway Labor Act (45 U. S. C., Sec. 153 First (i), (j) and (m):

"Section 3. First . . . .

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel. or by other representatives, as they may respectively elect, and the several divisions of the Ajustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

• • •

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

STATEMENT OF THE CASE

This action was instituted by four employees of the Erie Lackawanna Railroad Company (named as a respondent herein along with the four employee plaintiffs) who alleged that they were furloughed from their positions as stationary engineers in June of 1962, and replaced by employees of the former Erie Railroad, as a result of the merger of the former Delaware, Lackawanna and Western Railroad Company and the Erie into the present company, and that they received no compensation from defendant Railroad Company for their loss of employment. It was alleged that this constituted a violation of the Interstate Commerce Act and the "Implementing Agreement" between the Railroad Company and its employees, and that the Railroad Company violated the Railway Labor Act by failing to give plaintiffs 30 days' advance notice of a change in working conditions. In addition it was alleged that the treatment of which plaintiffs complained constituted a wrongful discharge, and the complaint purported to predicate jurisdiction on diversity of citizenship and jurisdictional amount as well as on the fact that the action was claimed to arise under the Interstate Commerce Act and the Railway Labor Act.

The only charge asserted against defendants other than the Railroad Company was that they failed to process claims on behalf of plaintiffs to remedy the asserted wrongful acts of the Railroad Company, and it was said that this amounted to hostile discrimination and a violation of the terms of "the collective bargaining agreement."

Motions to dismiss the complaint, for lack of jurisdiction of the subject matter and failure to state a claim upon which relief could be granted, were filed by the Railroad Company and by the union defendants (petitioners here), and sustained by the District Court on a finding of no basis for federal jurisdiction. With respect to the claim against the union defendants, the District Court said:

> "Although the plaintiffs use the phrase 'hostile discrimination' in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961)." (Appendix D., p. 13a.)

Plaintiffs did not file or seek leave to file an amended complaint but instead appealed from the decision of the District Court.

The Court of Appeals reversed this holding as to the union defendants, on the ground that the complaint stated a federal claim against the union for breach of its duty of fair representation. As to the Railroad Company, however, dismissal of the complaint was affirmed on the ground of exclusive primary jurisdiction of the National Railroad Adjustment Board over plaintiffs' claim of wrongful discharge in violation of the collective bargaining agreement. The Court of Appeals further held that on remand plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad Company, but that in order to do so they would have to show joint discrimination of the company with the union, that is a combined attempt to discriminate. Absent such amendment of the complaint, the decision of the Court of Appeals leaves the plaintiffs free to pursue the independent remedies of a court action for damages against the union, and a claim filed with the National Railroad Adjustment Board against the Railroad Company based on its alleged breach of the collective bargaining agreement.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Western District of New York, as alleged by plaintiffs, was that there was diversity of citizenship and more than $10,000.00 in controversy; that the action arose under the Interstate Commerce Act (49 U.S.C. Sec. 5 et seq.); and that the action arose under the Railway Labor Act (45 U.S.C., Sec. 151 et seq.).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with applicable decisions of this Court.

In holding that the plaintiffs could maintain an action against the union defendants for damages for violation of the duty of fair representation, but could proceed against the Railroad Company on their wrongful discharge claim only before the National Railroad Adjustment Board, the Court of Appeals ignored this Court's holding in *Vaca* v. *Sipes*, 386 U.S. 171, a leading decision on the fair representation principle. In its opinion the *Vaca* case is not cited, referred to or discussed.

In that case an employee, claiming that he had been wrongfully discharged in violation of the collective bargaining agreement, brought suit against the union claiming that it had breached its duty of fair representation by refusing to process his grievance. The employer was not made a party to the action, and the plaintiff obtained a judgment of compensatory and punitive damages against the union based on the employer's breach of contract. This Court reversed the judgment, and as one of the grounds for reversal held that damages could not be recovered from the union for the employer's breach of contract. The Court said:

> " . . . Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have ex-

> plained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in *Humphrey* v. *Moore*, supra." (386 U.S., p. 197.)

The decision of the Court of Appeals in the present case stands squarely in conflict with *Vaca* v. *Sipes*, supra. It holds that the plaintiff employees *are* entitled to maintain an action to recover damages solely from the union for "the employer's unrelated breach of contract which triggered the controversy," and that an employer *can* "hide behind the union's wrongful failure to act."

That the complaint here alleged only an "employer's unrelated breach of contract" was recognized by the Court of Appeals when, in its remand order, it permitted plaintiffs to amend their complaint, if they could, to allege complicity between the union defendants and the Railroad Company. Such disposition of the appeal leaves the case in the anomalous situation where the only way the union can escape the full burden of liability for the employer's breach of contract is for the plaintiff employees to show that the union induced, or conspired to procure, that breach.

This result, and the rationale and holding of the court below, are directly at odds with this Court's decision in *Vaca* v. *Sipes*, supra. As the Court indicated in that portion of the opinion quoted above, the fact that the employer is primarily or totally responsible for plaintiffs' damages makes it essential that the employer be made a party to the action, and the union cannot be made to assume the employer's burden of damages.

Further in clear conflict with the *Vaca* decision is the ruling below to the effect that plaintiffs could proceed

separately against the union and the Railroad Company before two different tribunals, the District Court and the National Railroad Adjustment Board. As the Court said:

> "These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate." (386 U.S.,-p. 188, footnote 12.)

This decision below also fails to recognize and properly apply general principles of exhaustion of administrative remedies and arbitration procedures which this court has formulated in numerous decisions in the labor-management field. That these principles have application in a fair representation case such as this was made clear in the Court's opinion in the *Vaca* case. As the Court stated, " . . . it is settled that the employee *must at least attempt* to exhaust exclusive grievance and arbitration procedures established by the collective bargaining agreement. Republic Steel Corp. v. Maddox, 379 U. S. 650, 13 L. Ed. (2d) 580, 85 S. Ct. 164." (386 U.S., pp. 184-185; emphasis supplied.)

In the instant case there was no showing that plaintiffs had attempted to pursue available administrative remedies individually, after the alleged refusal of the union to process their wrongful discharge claims. It was conceded, and recognized by the Court of Appeals, that they could have done so. Indeed, in sustaining dismissal of the action as to the Railroad Company, the court below limited plaintiffs to their administrative remedy before the National Railroad Adjustment Board, in pursuing their breach of contract claim against their employer. But it held

that in suing the *union*, for damages *occasioned by the same breach* of contract, " . . . plaintiffs need not establish that they 'could not personally press their rights under the collective bargaining agreement' in order to maintain this action against the union." (Appendix C, p. 4a; 407 F. (2d), pp. 678-679.)

Conley v. *Gibson*, 335 U. S. 41, cited by the Court of Appeals in this context, does not stand for the proposition that an employee can recover damages from his union for the employer's breach of contract. It was an action to compel the union to handle grievances on an impartial basis, without discrimination as to race, and held that Negroes as well as white employees were entitled to the advantages and assistance of union representation in this area. It was not a suit for damages stemming from a breach of contract, but rather sought judicial enforcement of the right to be represented in the administrative processing of such a claim.

Finally, *Vaca* v. *Sipes*, supra, emphasizes that a mere showing of a refusal to handle an employee's grievance is not sufficient to make out a case against the union based on unfair representation. Even though the grievance be shown to be meritorious, the employee must show that there was bad faith, arbitrary conduct, or hostile discrimination on the part of the union. (386 U.S., pp. 188-195.)

Even tested by the very liberal standards of federal notice pleading, the complaint in this case clearly fails to state a claim against the union for violation of its duty of fair representation. Beyond claiming that the union refused to process their grievance, plaintiffs have alleged no facts which would even support an inference of bad faith, arbitrary conduct or hostile discrimination on the part of the union defendants.

The insufficiency of the complaint with respect to the fair representation claim against the union was in fact recognized by the Court of Appeals. In the portion of its opinion dealing with this aspect of the case, it states:

> "The complaint does not make clear the basic reason why plaintiffs are aggrieved . . . " (App. C., p. 4a; 407 F. (2d), p. 679.)

At the hearing before the Court of Appeals, counsel for plaintiff sought to cure the inadequacy of the complaint by arguing orally, completely *extra* the record, that the union's refusal to handle the grievance was motivated by political considerations. In discussing this contention the Court of Appeals again pointed up the inadequacy of the complaint, saying:

> " . . . we do not think that this basis of the claim can be fairly inferred from the face of the complaint . . . " (App. C., p. 4a; 407 F. (2d), p. 679).

Nevertheless, the court below proceeded to ignore the acknowledged insufficiency of the complaint, and attempted to justify reversal of its dismissal by the District Court on the grounds that the defendants might have developed the nature of plaintiffs' unstated claim by discovery, and that "a plaintiff should be given the opportunity to file supplemental pleadings." (App. C., p. 4a; 407 F. (2d), p. 679.) But plaintiffs neither sought nor were denied an opportunity to amend their complaint; and we submit that defendants should not be compelled to cure the deficiencies in a complaint which they are entitled to have dismissed under Rule 12(b) of the Federal Rules of Civil Procedure.

2. The decision below is in conflict with applicable decisions of other courts of appeals.

As this Court pointed out in its opinion in *Vaca* v. *Sipes*, 386 U.S. 171, other courts of appeals have consistently entertained actions of employees based on rights under the collective bargaining agreement where both the employer and union were joined as defendants, where the gist of the claim against the union was, as here, that it had failed to process the employee's grievance. (386 U.S., pp. 185-187.) The action of the court below in permitting the suit to be maintained only against the union conflicts with those cases as well as this Court's decision in the *Vaca* case.

With respect to its rulings on the lack of any duty of plaintiffs to attempt to exhaust administrative remedies, and the sufficiency of the complaint in spite of its failure to allege anything from which the essential element of bad faith on the part of the union might be inferred, the holding of the court stands squarely in conflict with recent decisions of other courts of appeals.

With respect to exhaustion of remedies, the Court of Appeals for the Seventh Circuit, in *Slagley* v. *Illinois Central Railroad Company*, 397 F. (2d) 546, after recognizing the statutory right of individual railroad employees to submit their claims to the National Railroad Adjustment Board (as contrasted with contractual arbitration procedures outside the railroad industry where, as in *Vaca* v. *Sipes*, arbitration is not available unless invoked by the union), stated the rule as follows:

> "However, we need not decide whether the differences between the statutes render the *Maddox-Vaca* principles inapplicable to minor disputes under the Railway Labor Act. To come within the *Maddox-Vaca* exception to the general exhaustion requirement an employee seeking to enforce a collective bargaining agreement must allege that he has attempted to utilize the available contract grievance procedure and that his attempt has been thwarted by union conduct constituting a breach of the duty of fair representation .... Appellant's complaint is plainly insufficient. It contains no allegation that he attempted to use the contract grievance procedures or file his claim with the Adjustment Board." (397 F. (2d), pp. 551-552).

In the same case, in passing on the sufficiency of plaintiff's allegations of the bad faith essential to a fair representation claim against the union, the court said:

> "The pertinent allegations of the complaint are that the O.R.C. & B. compelled I.C. to deprive appellant of his seniority, that this action was 'wrongful, unlawful, and unconstitutional,' 'arbitrary and capricious,' and 'constituted wrongful and unlawful discrimination toward plaintiff,' and that the action breached the collective bargaining agreement and violated the Federal and Indiana Constitutions. We find these allegations insufficient to state a claim for breach of the duty of fair representation. They are mere conclusions of law, plainly insufficient under the Federal Rules of Civil Procedures .... " (397 F. (2d), p. 552.)

Similiarly applying the requirement of exhaustion of remedies, when available, in a fair representation case, is the decision of the Court of Appeals for the Sixth Circuit *Steen* v. *Local Union No.* 163, *United Auto., A. & A. Imp. Wkrs.*, 373 F. (2d) 519. In that case, as here, plaintiff's claim against his union was that it had refused to initiate a grievance on his behalf. In sustaining a dismissal of the complaint, the court said:

> "Plaintiff communicated with the foreman neither verbally nor in writing. He did contact various officials of the local and international unions, but to allow such activity to serve as a substitute for the contractual grievance procedures would be to 'deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.' Republic Steel Corp. v. Maddox, supra. 379 U.S. at 653, 85 S. Ct. at 617 . . . . " (373 F. (2d), p. 520.)

On the sufficiency of allegations of bad faith in a fair representation case, the decision below sharply conflicts with another decision of the Court of Appeals for the Sixth Circuit. In *Balowski* v. *International U., United A., A. & A. Imp. Wkrs.*, 372 F. (2d) 829, that court said:

> "The allegations of a complaint alleging the breach of a Union's duty of fair representation must contain more than 'conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is "hostile discrimination".' Gainey v.

> Brotherhood of Railway Employees, 313 F. 2d 318, 323 (C.A. 3). '[C]onclusory words * * * without a concomitant showing a lack of good faith [does] not set forth a claim.' Hardcastle v. Western Greyhound Lines, 303 F. 2d 182, 186 (C.A. 9), cert. denied, 371 U.S. 920, 83 S. Ct. 288, 9 L. Ed. 2d 229. See also Colbert v. Brotherhood of Trainmen, 206 F. 2d 9 (C.A. 9), cert. denied, 346 U.S. 931, 74 S. Ct. 320, 98 L. Ed. 422; Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md.) aff'd 273 F. 2d 614, cert. denied, 363 U.S. 849, 80 S. Ct. 1628, 4 L. Ed. 2d 1732." (372 F. (2d), p. 835.)

Similarly, the Court of Appeals for the Third Circuit set forth requirements of pleading bad faith or hostile discrimination of the union which plaintiffs here clearly failed to meet. In *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, etc., 313 F. (2d) 318, that Court said:

> " . . . the complaint before us must have more than conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.' An allegation that certain conduct of the Brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory', without a concomitant indentification of lack of good faith, will not set forth a claim sufficient to call for the use of the Steel doctrine." (313 F. (2d), p. 323.)

As we have noted, and as the court below conceded, the complaint in the present case alleged nothing more than the bare conclusion that the union's refusal to process

plaintiffs' grievances constituted hostile discrimination. The record is silent as to any facts from which bad faith or a discriminatory motive could be inferred. Absent such bad faith or improper motive, it is clear from this Court's decisions and those of other courts of appeals that plaintiffs have not stated a sufficient claim against the union defendants for violation of the duty of fair representation.

3. This case involves important questions concerning the conduct of a vital and perhaps major segment of labor-management relations, which the court below has decided in such a way as to seriously disrupt collective bargaining and the statutory procedures for disposition of employee grievances and contract claims in the railroad industry.

Although categorized as "minor disputes," grievances and contract claims of employees constitute the week-in-week-out, year-around business of the collective bargaining process. To avoid interruptions to commerce resulting from strikes over such disputes Congress provided, in the Railway Labor Act (45 U.S.C., Sec. 151 et seq.) for a complete system of compulsory arbitration before the National Railroad Adjustment Board, eliminating the strike as a legitimate means of settling these "minor disputes." *Gunther* v. *San Diego & A.E.R. Co.*, 382 U.S. 257, *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30.) The Board's jurisdiction over

such disputes is exclusive (*Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239.)

The effect of the decision below is to open the doors of the courts to litigation over all employee grievances and contract claims which the union fails or refuses to process, while at the same time leaving the employee free to process the same claim or grievance, simultaneously or consecutively, before the National Railroad Adjustment Board. The court below prescribed no measure of damages or limit upon the recovery which the employees might obtain in their damage action against their union, or in their Adjustment Board proceeding against the Railroad Company. Presumably it contemplated that a full recovery against either or each might be had for whatever damages had been suffered by the employees as a result of the alleged breach of contract by the Railroad Company. And presumably, if the employees should fail to prevail on the merits before one tribunal, they would have a second chance before the other.

On the basis of the holding below, a union can be forced to defend a court action for damages whenever it refuses to process a grievance. As in the instant case, all that must be alleged is that such refusal constituted "hostile discrimination." The disruptive effects of such a rule are aptly described in this Court's opinion in *Vaca* v. *Sipes*, 386 U.S. 171, pp. 191-192. Unions would be compelled either to process all grievances and contract claims of the employees they represent, or to handle none of them, and abandon this large segment of the collective bargaining function to individual handling. Either course would be disastrous, from the point of view of both employer and em-

ployees, and the statutory arbitration procedure before the Adjustment Board would be so overburdened as to become unworkable.

Similar effects would ensue if, as held below, grievances could be processed twice, before two different tribunals. As the Court of Appeals for the Seventh Circuit said, in commenting upon this Court's ruling in *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601:

> " . . . A contrary holding would make a shambles of the statutory and contractual provisions for the settlement of grievances." (382 F. (2d) 780, 786; cert. den. 389 U.S. 1042.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

JUDGMENT OF COURT OF APPEALS

(Entered February 24, 1969)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February, one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. MARVIN E. FRANKEL,
District Judge.

John R. O'Mara, George McCormick, Julius Packard and Walter Daly,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

APPENDIX B

ORDER OF COURT OF APPEALS DENYING REHEARING

(Entered March 18, 1969)

32184

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

John R. O'Mara, George McCormick,
Julius Packard and Walter Daily,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Company,
et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee, appellees herein.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

/s/ J. Edward Lumbard
U.S.C.J.
Marvin E. Frankel
U.S.D.J.

APPENDIX C

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 211—September Term, 1968.

(Argued December 4, 1968 Decided February 24, 1969.)

Docket No. 32184

John R. O'Mara, George McCormick, Julius Packard and Walter Daly,

Plaintiffs-Appellants

—v.—

Erie Lackawanna Railroad Company, International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee,

Defendants-Appellees.

B e f o r e :

Lumbard, *Chief Judge*, Friendly, *Circuit Judge*, and Frankel, *District Judge*.*

Appeal from an order of the District Court for the Western District of New York, Henderson, *J.*, granting defendant's motion to dismiss the complaint for lack of federal jurisdiction.

Reversed and remanded.

* Sitting by designation

Opinion of Court of Appeals

James P. Shea, Buffalo, N.Y. (Flaherty & Shea, on the brief), *for plaintiffs-appellants.*

Richard F. Griffin, Buffalo, N. Y. (Moot, Sprague, Marcy, Landy & Fernbach, and Courtland R. LaVallee, on the brief), *for appellee, Erie Lackawanna Railroad Company.*

Richard R. Lyman, Toledo, Ohio (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N. Y., and Mulholland, Hickey & Lyman, Toledo, Ohio, on the brief), *for defendants-appellees Henry J. Czosek, Henry J. Czosek as Chairman, etc., and Edward P. McEntee, etc.*

Lumbard, *Chief Judge*:

Plaintiffs brought this action in the District Court for the Western District of New York seeking damages for their allegedly wrongful discharge, without compensation, from employment as stationary engineers with the Erie Lackawanna Railroad. Joined as defendants with the Railroad are the International Brotherhood of Firemen and Oilers and several of its affiliates and officers. The complaint alleged that the union defendants had been guilty of "hostile discrimination" in refusing to process plaintiffs' grievances against the Railroad.

The district court granted defendants' motion to dismiss the complaint, finding no basis for federal jurisdiction.

We reverse. We hold that the complaint, read in the generous spirit appropriate under the Federal Rules, states a federal claim against the union for breach of its duty of fair representation. On remand we grant plaintiffs leave to amend their complaint, if they can, to state a cause of

action against the Railroad based on its having acted with knowledge of the union's discrimination. *Glover* v. *St. Louis-San Francisco Ry. Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969); *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961).

Prior to 1960 the plaintiffs were employed by the Delaware, Lackawanna & Western Railroad as stationary engineers in a power plant in Buffalo, New York. In that year the Delaware merged with the Erie Railroad, with the approval of the Interstate Commerce Commission, forming the present defendant Erie Lackawanna line. Plaintiffs were continued in their former positions by the merged line until 1962, when they were furloughed.

The complaint is very grudging in its recitation of the claims upon which federal jurisdiction is invoked. It is alleged that the 1962 furlough constituted a discharge of plaintiffs since they were never recalled and were in fact replaced by employees who had worked for the Erie Railroad before the merger. The complaint then claims that the discharges were the direct result of the 1960 merger, and violated "the Interstate Act 49 USCA Sect. 5 et seq." and the "Implementing Agreement" between the Erie Lackawanna and its employees represented by defendant unions. A violation of the Railway Labor Act, 45 U.S.C.A. §151 *et seq.*, is also alleged in that the Railroad failed to give the required 30 days written notice of an intended change in working conditions prior to the discharge of the plaintiffs.

Finally it is alleged that plaintiffs repeatedly requested the defendant unions and their officials to process their claims against the Railroad, but that these defendants "have been guilty of gross nonfeasance and hostile discrimi-

nation in their arbitrary and capricious refusal to process said claims," and "have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiff's loss of employment and the resulting loss of compensation therefrom." The prayer is for judgment in the sum of $160,000 against any or all of the defendants.

The district court was correct, on the allegations before it, in dismissing the portion of the complaint claiming a violation of the Implementing Agreement by the Railroad in discharging plaintiffs. It is settled that such a contract dispute between employees and a railroad falls within the primary jurisdiction of the National Railroad Adjustment Board, 45 U.S.C. §153 First (i). See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 34-35, 39 (1957); *Walker* v. *Southern R.R. Co.*, 385 U.S. 196, 198 (1966). It follows that plaintiffs cannot maintain an action for damages under federal law since their complaint does not allege that they have exhausted their remedy before the Board. The union's refusal to process their grievances does not excuse plaintiff's failure to exhaust since individual employees have standing to prosecute their own grievances before the Board, 45 U.S.C. §153 First (j); cf. *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570, 572 (2d Cir. 1967). Nor is this conclusion altered by the allegation that the Railroad failed to give to the union the 30 days notice of a change in working conditions required by 45 U. S. C. §156. See *Hudie* v. *Aliquippa & Southern Railroad Co.*, 249 F. Supp. 210,

212 (W. D. Pa.), *aff'd per curiam* 360 F. 2d 213 (3rd Cir. 1966).

Ostensibly the complaint alleges that the Railroad's action was wrongful in two distinct respects, i.e., that it violated the Implementing Agreement between the Railroad and the union, and that it violated the Interstate Commerce Act. In reality, however, it appears that the basis of both these claims lies in the Implementing Agreement, and that therefore the doctrine of exhaustion of administrative remedies is fatal to both claims.

On appeal we are informed that the section of the Act relied upon is 49 U.S.C. §5(2)(f),[1] which provides certain

---

1 49 U. S. C. §5(2)(f) provides:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

safeguards for employees affected by a railroad merger. The Supreme Court has ruled that this section does not prevent the discharge of employees as a result of a merger, but rather relates only to questions of compensation. *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U. S. 169 (1961). The complaint provides us with no indication that plaintiffs are attacking any action taken by the Interstate Commerce Commission under §5(2)(f), nor does it allege in what respect the section has been violated. The section does authorize a railroad and union to enter into an agreement protecting the interests of workers affected by a merger. To the extent that plaintiffs have been wronged it appears to have been through a misapplication of the Implementing Agreement. Thus once again we have the type of employee-employer contract dispute which under federal law must be submitted first to the Railroad Adjustment Board and not to the courts. Cf. *Arnold* v. *Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom. Batts* v. *Louisville & Nashville R.R. Co.*, 316 F. 2d 22 (6th Cir. 1963). Dismissal of this portion of the complaint was proper, in addition, because it did not give defendants "fair notice" of the basis of plaintiffs' claim under the Act. *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957).

But we think that a different result is required concerning the portion of the complaint which alleges "hostile discrimination" on the part of the union defendants in refusing to process plaintiffs' claims against the railroad. In *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944), the Supreme Court held that the Railway Labor Act imposes upon unions a duty to represent fairly, without "hostile discrimination," all workers within a bargain-

ing unit. Since a charge by an employee against a union for a violation of this duty does not involve a dispute between "an employee or group of employees and a carrier or carriers," 45 U.S.C. §153 First (i), it does not fall within the jurisdiction of the Railroad Adjustment Board. Therefore it may be the basis of a suit in a federal district court. *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Cunningham* v. *Erie Railroad Co.*, 266 F. 2d 411, 414-16 (2d Cir. 1959).

This is true even where the claim of hostile discrimination is based on the union's failure to process a grievance and it is clear that the employees themselves could have carried their grievance to the Adjustment Board. The Supreme Court has held that this right to process a grievance personally cannot excuse a union's refusal to fulfill its duty of fair representation, for the union is in a far better position successfully to process a grievance than are individual workers. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Thus, we disagree with the district court and hold that plaintiffs need not establish that they "could not personally press their rights under the collective bargaining agreement" in order to maintain this action against the union.

The only real question is whether the complaint's allegation of "hostile discrimination" is so unexplicated that it fails to give union defendants fair notice of the ground of plaintiffs' claim. The only hint concerning the nature of the discrimination is the complaint's statement that plaintiffs were replaced by " 'pre-merger' employees of the Erie Railroad."

The complaint does not make clear the basic reason why the plaintiffs are aggrieved, as stated to us upon the argument of the appeal, namely, that the union defendants are under the influence of the former employees of the Erie

Railroad and as a result are not representing fairly the interests of the former employees of the Delaware, Lackawanna & Western Railroad in the merged line. It is settled that such a claim of political discrimination states a good cause of action under the Railway Labor Act. *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961).

While we do not think that this basis of the claim can be fairly inferred from the face of the complaint, by the exercise of the liberal pre-trial and discovery devices available to them the defendants will be able to dispel any possible prejudice to them arising from the very broad nature of the allegations. See *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). Particularly in suits of this kind, where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed whenever possible to avoid dismissals based on technical deficiencies in the specificity of the allegations. At the least a plaintiff should be given the opportunity to file supplemental pleadings unless it appears "beyond doubt" that he cannot state a good cause of action. *Cf. Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

On remand we hold plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad, if they can, within the doctrine of *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961). There we suggested that, in a suit against a union for "hostile discrimination" the employer can be joined as a party defendant if it "acted from a motive to discriminate or with knowledge that the [union] was discriminating." 296 F. 2d at 851. Where the employer's action is only a consequence of the union's discriminatory conduct, *e.g.*,

Cunningham v. *Erie Railroad Co.*, 266 F. 2d 411 (2d Cir. 1959), or takes the form of joint discrimination with the union, then plaintiffs should be allowed to join the employer and the union in one action. *Glover* v. *St. Louis-San Francisco Ry Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969). And since the dispute draws its basic character from the union's violation of its duty of fair representation, recourse to the Railroad Adjustment Board should not be required insofar as the employer is fairly alleged to be implicated in the union's illegal conduct. *Id.*, 37 *U. S. L. W.* at 4085-86.

But dismissal of the employer from this suit will be proper if it appears that its action furloughing the plaintiffs, and the union's discriminatory refusal to process grievances concerning these furloughs, were not part of a combined attempt to discriminate. In that event plaintiffs' complaint against the Railroad would concern a violation of their rights under the collective bargaining agreement and this, as discussed above, falls within the exclusive primary jurisdiction of the Ajustment Board.

The order of the district court is reversed and the complaint against the union is reinstated, with leave to the plaintiffs to amend the complaint to state a cause of action against the Railroad. If plaintiffs are unable so to amend then the complaint against the Railroad should be dismissed.

APPENDIX D

DECISION AND ORDER OF DISTRICT COURT

(Issued January 10, 1968)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. O'MARA; GEORGE McCORMICK; JULIUS PACKARD; and WALTER DALY,
Plaintiffs

—vs— CIVIL 1967-30

ERIE LACKAWANNA RAILROAD COMPANY; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; ANTHONY E. MATZ, International President, International Brotherhood of Firemen and Oilers; FRED R. McKERNAN, General Chairman, System Council No. 2, International Brotherhood of Firemen and Oilers; HENRY J. CZOSEK, Chairman Local No. 826, International Brotherhood of Firemen and Oilers; SYSTEM COUNCIL NO. 2, International Brotherhood of Firemen and Oilers, LOCAL NO. 826; SYSTEM FEDERATION NO. 78; and SYSTEM FEDERATION NO. 100,
Defendants.

Lipsitz, Green, Fahringer, Roll, Schuller & James (Richard Lipsitz, Esq., of Counsel), Buffalo, New York, Attorneys for Defendants Henry J. Czosek, Henry J. Czosek as

Chairman, Local Lodge 826, and
Edward P. McEntee.
Moot, Sprague, Marcy, Landy &
Fernbach (Richard F. Griffin, Esq.,
of Counsel), Buffalo, New York,
Attorneys for Defendant Erie
Lackawanna Railroad Company.

Flaherty & Shea (James P.
Shea, Esq., of Counsel),
Buffalo, New York,
Attorneys for Plaintiffs.

The plaintiffs are members of Local 826, System Federation No. 78 and Council No. 2 of the International Brotherhood of Firemen and Oilers. They were originally employed as stationary engineers of the Delaware, Lackawanna & Western Railroad. In September of 1960, however, the Interstate Commerce Commission authorized the merger of the Delaware, Lackawanna & Western Railroad with the Erie Railroad into the present Erie Lackawanna Railroad. Thereafter, in June of 1962, the plaintiffs were furloughed from their employment and replaced by pre-merger employees of the Erie Railroad.

The plaintiffs commenced this action seeking damages alleged to flow from their loss of employment. Before the court are motions by the defendants, who have been served in this action, to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim for which relief can be granted.

Inasmuch as diversity of citizenship clearly is lacking as among the parties, jurisdiction may not be predicated upon that ground. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 65, 71 (1939), *American Fire & Cas. Co.*, v. *Finn*, 341 U. S. 6, 17 (1951). The plaintiffs argue, however, that the action may be sustained either as a suit for wrongful discharge or as a suit based upon hostile discrimination.

Assuming, without deciding, that the complaint may be viewed as a discharge grievance subject to arbitration under the Railway Labor Act (45 U. S. C. §§151 et seq.), the action would be governed by the principles set forth in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). *Walker* v. *Southern Ry. Co.*, 385 U.S. 196 (1966). These decisions permit an aggrieved railroad employee to elect to treat his discharge as final without exhausting his administrative remedies when, and only when, diversity jurisdiction exists and such exhaustion is not required under applicable state law. See *Larson* v. *American Air Lines, Inc.*, 313 F. 2d 599, 602 (2d Cir. 1963); *Walters* v. *Chicago & Northwestern Ry. Co.*, 216 F. 2d 332, 335-336 (7th Cir. 1954). Here, not only is diversity jurisdiction lacking, but it also seems clear that the New York courts would require exhaustion. See *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570 (2d Cir. 1967). The complaint does not allege, and in opposition to this motion the plain-

tiffs have not claimed that they have exhausted their administrative remedies.

Although the plaintiffs use the phrase "hostile discrimination" in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele v. Louisville & Nashville R.R. Co.*, 323 U. S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961).

Finding no basis for federal jurisdiction, the complaint is dismissed. So ordered.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

DATED: Jan. 10, 1968.

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IN THE

Supreme Court of the United States

October Term, 1968

No. ~~1500~~ 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

BRIEF OF RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS G. RICKERT,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1520

HENRY J. CZOSEK, *et al.*,

Petitioners,

vs.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,

Respondents.

BRIEF OF RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

Respondent does not take issue with petitioners' formulation of the questions presented for review as expressed in numbers two and three on pages two and three of its petition. However, respondent feels that question number one as phrased below more clearly defines the issues relevant to that part of the petition in this Court.

1. Is the employer a necessary party in a suit brought by railroad employees against their railroad for alleged wrongful discharge and their union for alleged breach of its duty of fair representation where plaintiffs have not attempted to pursue their administrative remedies breach of its duty of fair representation where plaintiffs have not attempted to pursue their administrative remedies to the National Railroad Adjustment Board, even though they could have done so individually, and the employer's action was neither a consequence of the union's alleged discriminatory conduct nor was there any allegation of joint discrimination against the employees by the railroad and the union?

ARGUMENT

The Court of Appeals was correct in sustaining the District Court's order dismissing the complaint as to the employer-railroad.

Respondent agrees with petitioners' basic contention that the District Court was correct in dismissing the complaint as to all the defendants. However, respondent cannot agree that it is a necessary party to an action by a group of employees against their union for breach of its duty of fair representation.

In essence, the Court of Appeals construed the complaint to contain two separate and distinct causes of action:

(1) the furlough of plaintiffs by the railroad in violation of an "Implementing Agreement" between the railroad and its employees represented by defendant union; and

(2) a breach of the duty to represent fairly, without "hostile discrimination," all workers within a bargaining unit. (*O'Mara v. Erie Lackawanna Railroad Company*, 407 F. 2d 674 (1969)). In dismissing the first part of the complaint as against the railroad, the Court of Appeals pointed

out that a dispute of this nature fell within the primary jurisdiction of the National Railroad Adjustment Board, 45 U. S. C. Section 153 First (i) and, under such circumstances, the employees cannot maintain their action against the employer without first showing that they have exhausted their remedy before the Board. However, as to the second cause of action against the union alone, the Court of Appeals felt that the complaint was sufficient to state a cause of action against those defendants. Nonetheless, that Court granted leave to plaintiffs to amend their complaint, if they were so able, to allege a cause of action against the railroad on the basis of joint discrimination with the union. Therefore, barring amendment of the complaint by plaintiffs, what remains is a suit by employees against their union for "hostile discrimination."

In reaching its decision, the Court of Appeals did not make any determination as to the measure of damages to be recovered in a hostile discrimination suit. Consequently, it is not fair to say that the Union, as suggested by petitioners, if it should be held liable to the plaintiff, would be required to assume the employer's burden of damages. Such damages or relief could well take the form of an order of the Court requiring the Union to represent the plaintiffs in their claim against the railroad, and/or money damages, directly attributable to the union's breach of duty if plaintiffs can establish such.

Considering the fact that the Courts below in the instant case have been dealing with two separate and distinct causes of action, the decision of the Court of Appeals does not conflict in any way with applicable decisions of this Court or those of the Court of Appeals of other circuits. Unless this Court is prepared to abolish the doctrine of exhaustion of administrative remedies as expressed in

Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965), the decision in the instant case must stand. In the recent case of *Glover v. St. Louis-San Francisco Railway Co.,* ___ U. S. ___, 89 S. Ct. 548 (1969), this Court reaffirmed the vitality of the *Maddox* doctrine. There, the Court pointed to some exceptions to the exhaustion requirement. After quoting from *Vaca v. Sipes,* 386 U. S. 171 (1967), the Court specifically referred to some of the exceptions to the exhaustion requirement as expressed in *Vaca.* These were:

(1) situations where the employer's conduct amounts to a repudiation of the contractual procedures; and

(2) cases where the union has the sole power to process the grievance. 386 U. S., at 185, 87 S. Ct., at 914.

In *Glover,* the Court added another exception, to wit: occasions where it would be futile to proceed formerly with the administrative remedies.

In the case at bar, there is no allegation or showing—indeed not even a suggestion—that any of these exceptions are applicable. Consequently, the thrust of petitioner's argument is that this Court should carve out another exception and relieve a party from the duty of pursuing his administrative remedies in accordance with the *Railway Labor Act* by the simple expedient of adding a cause of action against its union for a breach of its duty of fair representation, regardless of the substantiality of such a claim. It is submitted that such an exception would tend to subvert the legislative intent underlying the provisions of the *Railway Labor Act,* 45 U. S. C. Section 151 *et seq.,* which provides a precise procedure for the handling of minor disputes between railroad employees and their employers.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Complaint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. O'MARA, *et al.*,

Plaintiffs,

vs.

ERIE LACKAWANNA RAILROAD COMPANY, *et al.*,

Defendants.

Civ-1967-30

FIRST: At all times hereinafter mentioned, Plaintiffs were and are citizens of the State of New York and the Defendant, Anthony E. Matz is a Citizen of the State of Pennsylvania and the Defendant, International Brotherhood of Firemen and Oilers is a membership association having its principal place of business in a State other than New York. The matter in controversy exceeds, exclusive of interest and Costs, the sum of Ten Thousand Dollars ($10,000.00).

SECOND: The action arises under the Interstate Commerce Act 49 USCA Sect. 5 *et seq.* The matter in controversy exceeds, exclusive of interest and Costs, the sum of Ten Thousand Dollars ($10,000.00).

THIRD: This action arises under the Railroad Labor Act, 45 USCA Sect. 151 *et seq.* The matter in controversy ex-

ceeds, exclusive of interest and Costs, the sum of Ten Thousand Dollars ($10,000.00).

FOURTH: Plaintiffs herein were members of Local No. 826, System Federation No. 78 and System Council No. 2 of the International Brotherhood of Firemen and Oilers in the year 1962 and for a number of years prior thereto.

FIFTH: Plaintiffs herein were employed as stationary engineers of the Delaware, Lackawanna and Western Railroad in the year 1960 and for some years prior thereto and at the time of the merger of the Erie Railroad and the Delaware, Lackawanna and Western Railroad was authorized by the Interstate Commerce Commission in September of 1960; Plaintiffs continued in their employment for the newly formed Erie Lackawanna Railroad Company.

SIXTH: The Plaintiffs remained in said employment until June 1962 when they were furloughed and never recalled having been replaced by "pre-merger" employees of the Erie Railroad.

SEVENTH: The furloughing of the Plaintiffs by the Erie Lackawanna Railroad Company in 1962 and their subsequent replacement, was in effect, a termination of the employment relation by way of a discharge.

EIGHTH: The wrongful discharge of the Plaintiffs was a direct result of the merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad and in contravention of the Interstate Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie Lackawanna Railroad Company as a result of their loss of employment.

NINTH: The discharge of the Plaintiffs was a result of the merger of the Delaware, Lackawanna and Western

Railroad Company and the Erie Railroad in contravention of the Implementing Agreement between the Erie Lackawanna Railroad Company and its employees represented by System Federation No. 78 and System Federation No. 100, supplementing and implementing the Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie Lackawanna Railroad Company as a result of their loss of employment.

TENTH: That contrary to the Railroad Labor Act, 45 USCA Sect. 151 *et seq.* the Defendant Erie Lackawanna Railroad Company not only failed to give Plaintiffs thirty (30) days written notice of intended change in working conditions, but also failed to give any notice of said change.

ELEVENTH: That the Plaintiffs repeatedly requested the Defendant International Brotherhood of Firemen and Oilers and its president, Anthony E. Matz, Defendants, Systems Council No. 2, System Federation No. 78 and System Federation No. 100 and their general chairman, Fred R. McKernan, and Defendant, Local No. 826 and its chairman, Henry J. Czosek, to process their claims against the Erie Lackawanna Railroad Company and the aforementioned union, its officers and affiliates have been guilty of gross nonfeasance and hostile discrimination in their arbitrary and capricious refusal to process said claims, all to the detriment and damage of Plaintiffs.

TWELFTH: That the Defendant International Brotherhood of Fireman and Oilers and its president, Anthony E. Matz, Defendants System Council No. 2, System Federation No. 78, System Federation No. 100 and their general chairman, Fred A. McKernan, and Defendant Local No. 826 and its chairman, Henry J. Czosek, have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the

collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiffs loss of employment and the resulting loss of compensation therefrom.

THIRTEENTH: Plaintiffs demand a trial by jury on all issues presented herein.

WHEREFORE, Plaintiffs demand judgment against Defendant Erie Lackawanna Railroad Company or, International Brotherhood of Firemen and Oilers or Anthony E. Matz, System Council No. 2, System Federation No. 78 and System Federation No. 100, or Fred R. McKernan or, Local No. 826 or Henry J. Czosek, or against all in the sum of One Hundred Sixty Thousand Dollars ($160,000.00) and Costs and for such other and further relief as this Court deems just and proper.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

vs.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS O'MARA, McCORMICK, PACKARD AND DALY IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS O'MARA, McCORMICK, PACKARD AND DALY IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (Appendix C of Petition) is reported at 407 F(2d) 674. The decision and order of the District Court (Appendix D of Petition) is not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the named respondents herein may maintain their claim against the union based upon the union's discrimination and unfair representation and, in the same litigation, make claims against the railroad for acting in concert with the union, all of which resulted in discharge of the respondents herein from their employment?

Statutes Involved

The statutory provisions involved are set forth in pages 3 and 4 of the Petition.

Statement

This litigation concerns the discharge of four former employees of the Erie Lackawanna Railroad Company. Prior to the merger of the Delaware, Lackawanna and Western Railroad with the Erie Railroad, these men were employed as stationary engineers for the Delaware, Lackawanna and Western Railroad.

After the merger occurred, the men were furloughed and their positions as stationary engineers were filled by four men formerly holding a laborer's classification for the Erie Railroad.

These replacements, while belonging to the same parent union as the furloughed men, were members of different locals and System Federations, which locals and System Federation became the dominent force upon the merger.

Although the railroad and the union classified these men as furloughed they were never called back to work, and as indicated, their jobs were replaced.

One of the furloughed employees, as a spokesman for their group, contacted the railroad master mechanic and was advised that reason they lost their positions was due to plant obsolescence and not due to the merger and, therefore, no severance compensation was to be forthcoming.

The chief mechanical officer of the railroad was then contacted and he gave the same ruling. Thereupon, two union representatives, the General Chairman of the System Federation and the President of the International, were contacted and they referred the men to the railroad for any further requests for action indicating that there was nothing that they, the union, could or would do.

A complaint was filed in the District Court for the Western District of New York alleging a wrongful discharge by the railroad and hostile discrimination by the union and its officers in arbitrarily and capriciously failing to process their claims.

The District Court dismissed the complaint and an appeal was taken to the Second Circuit Court of Appeals.

The Court of Appeals reversed this holding as to the union defendants indicating that the complaint stated a federal claim for breach of the union's duty of fair representation. The Court further indicated that the plaintiffs should be granted leave to amend their complaint against the railroad, if they could show a joint and combined discrimination by the railroad and union.

I

The decision below is clearly correct.

The Petition indicates that the Court of Appeals ignored *Vaca vs. Sipes,* 386 U. S. 171 arriving at this conclusion by

indicating that case was not cited, referred to or discussed in its opinion.

The fact of the matter is that counsel for the four appellants not only cited *Vaca* in his brief to the Court of Appeals but referred to it in oral argument.

At page 177 the Court stated:

> "It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union has a statutory duty fairly to represent all of these employees, both in collective bargaining with Swift, see Ford Motor Co. vs. Huffman, 345 U. S. 330; Syres vs. Oil Workers International Union, 350 U. S. 892, and in the enforcement of the resulting collective bargaining agreement, see Humphrey vs. Moore, 375 U. S. 335."
>
> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Humphrey vs. Moore, 375 U. S. at 342. It is obvious that Owens' complaint alleged a breach by the union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action, *e.g.*, Ford Motor Co. vs. Huffman, *supra.*"

It is the essence of the respondents' contentions that the union failed to process their grievances and more seriously, discriminated against these men by agreeing with the railroad as to the abolishing of their jobs and replacement by four men from their union.

The petitioner's major complaint seems to be not that the Court of Appeals reversed as to them but that they did not reverse as to the railroad.

It is the intention of the respondents herein to file an amended complaint against the railroad as allowed by the Court of Appeals.

The respondents assert that a factual basis does indeed exist for litigation in federal court against both the railroad and the union and that relying upon the liberal pleading requirements as enunciated in *Conley vs. Gibson,* 335 U. S. 41, that they should at long last be allowed to have their day in court.

II

There is no conflict of decisions.

The Petition asserts that the Court of Appeals was in conflict with the Seventh Circuit in *Slagley vs. Illinois Central Railroad Company,* 397 F(2d) 546.

It is submitted that with respect to the claim against the union for hostile discrimination and failure of fair representation, that the National Railroad Adjustment Board has no jurisdiction to entertain such a complaint by an employee. Therefore, any argument relative to exhaustion of remedies in this area is clearly not applicable.

Likewise, in *Slagley,* the aggrieved party was concerned with seniority rights. There is no such relief requested in the instant case as it is clearly recognized that a question as to seniority rights is a matter within the exclusive jurisdiction of the National Railroad Adjustment Board. It is submitted that the Court of Appeals decision in this case is in direct conformity with Glover vs. St. Louis-San Francisco Railway Co., 393 U. S. 324 where the Court states that it is proper for federal courts to exercise jurisdiction over both the union and the railroad.

III

There is no important question of federal law.

The sum and substance of the Court of Appeals decision is to allow the plaintiffs to amend their complaint against the railroad, which they intend to do, and which will allow the litigation to proceed to a point where issue is joined.

The defendants have ample opportunity by means of discovery to inquire into the specifics of the claims and if, after this point, the claims do not meet the standards as required by federal law, the courts will take appropriate action.

It is respectfully submitted that the Court of Appeals, in a relatively narrow ruling on the facts peculiar to this case, merely decided that the plaintiffs below should be allowed to proceed with their lawsuit.

Because of the restricted fact situation, the Court of Appeals ruling will affect few, if any other cases.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 234

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JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 21-29) is reported at 407 F. (2d) 674. The decision and order of the District Court (A. 17-20) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 24, 1969. (A. 30-31.) Rehearing was denied by the Court of Appeals March 18, 1969. (A. 32.) The petition for a writ of certiorari was filed June 13, 1969, and was granted October 13, 1969. The jurisdiction of this Court rests on Title 28, United States Code, Section 1245 (1).

STATUTES INVOLVED

The statutory provisions principally involved are Sections 3 First (i), (j) and (m) of the Railway Labor Act (45 U. S. C., Sec. 153 First (i), (j) and (m)):

> "Section 3. First . . . .
>
> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> "(j) Parties may be heard either in

person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

• • •

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

QUESTIONS PRESENTED

1. May an action for damages brought by railroad employees against their employer for alleged wrongful discharge, and against their union and its representatives for failure to process their claims against the railroad, be dismissed as to the railroad on the ground of exclusive jurisdiction in the National Railroad Adjustment Board, but continue to be maintained as a "fair representation" case against the union and recovery sought solely from it, where the damages claimed stem from the alleged wrongful discharge by the employer in breach of the collective bargaining agreement, independent of any conduct by the Union?

2. May railroad employees maintain an action against their union for failure to process their grievances without exhausting their administrative remedies, when there is no showing that it would have been futile for them to do so, and no claim is made that they could not personally press their rights under the collective bargaining agreement and before the National Railroad Adjustment Board?

3. Is a proper claim for violation of a union's duty of fair representation stated by a complaint which fails to allege any facts which would constitute hostile discrimination by the union, or furnish any basis from which such hostile discrimination could reasonably be inferred?

STATEMENT OF THE CASE

This case is before the Court to review a judgment of the Court of Appeals below (A. 30-31) affirming in part, and reversing in part, the decision and order of the District Court (A. 17-20) dismissing the complaint. The effect of this ruling was to permit the plaintiffs, respondents here, to maintain an "unfair representation" suit against their collective bargaining representatives, the petitioners [1] while relegating them to their statutory administrative remedy before the National Railroad Adjustment Board for pursuit of their claims against petitioners' co-defendant, plaintiffs' employer, for the alleged wrong-

---

[1] The petitioners are Henry J. Czosek, Henry J. Czosek as Chairman, Local Lodge 826 of the International Brotherhood of Firemen and Oilers, Local No. 826, Edward P. McEntee, System Federation No. 78, and System Federation No. 100. The International Brotherhood of Firemen and Oilers, listed as one of the defendants-appellees in the caption of the proceedings below, was not served with summons and did not appear in the courts below.

ful discharge out of which the unfair representation charges arose.

The action was instituted by four employees of the Erie Lackawanna Railroad Company (named as a respondent herein along with the four employee plaintiffs) who alleged (Complaint, A. 4-7) that they were furloughed from their positions as stationary engineers in June of 1962, and replaced by employees of the former Erie Railroad, as a result of the merger of the former Delaware, Lackawanna and Western Railroad Company and the Erie into the present company, and that they received no compensation from respondent Railroad Company for their loss of employment. It was alleged that this constituted a violation of the Interstate Commerce Act and the "Implementing Agreement" between the Railroad Company and its employees, and that the Railroad Company violated the Railway Labor Act by failing to give plaintiffs 30 days' advance notice of a change in working conditions. In addition it was alleged that the treatment of which plaintiffs complained constituted a wrongful discharge, and the complaint purported to predicate jurisdiction on diversity of citizenship and jurisdictional amount as well as on the fact that the action was claimed to arise under the Interstate Commerce Act and the Railway Labor Act.

The only charge asserted against defendants other than the Railroad Company was that they failed to process claims on behalf of plaintiffs to remedy the asserted wrongful acts of the Railroad Company, and it was said that this amounted to hostile discrimination and a violation of the terms of "the collective bargaining agreement." [*] (Complaint, paras. Eleventh and Twelfth, A. 6-7.)

[*] No provisions of the agreement are pleaded, either verbatim or in substance.

Motions to dismiss the complaint, for lack of jurisdiction of the subject matter and failure to state a claim upon which relief could be granted, were filed by respondent Railroad Company (A. 10-11) and by petitioners (A. 8-9), and sustained by the District Court. With respect to the claim against the union defendants (petitioners), the District Court said:

> "Although the plaintiffs use the phrase 'hostile discrimination' in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro v. Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961)." (A.20.)

The District Court further found that there was no basis for federal jurisdiction alleged in the complaint. The jurisdictional allegations were (1) that there was diversity of citizenship and more than $10,000.00 in controversy (Complaint, para. First, A. 4); that the action arose under the Interstate Commerce Act, 49 U. S. C., Sec. 5 et seq (Complaint, para. Second, A. 5); and that the action arose under the Railway Labor Act, 45 U. S. C., Sec. 151 et seq. (Complaint, para. Third, A. 5). The court found that diversity of citizenship clearly was lacking as among the parties; and that insofar as the action purported to be brought under the Railway Labor Act, even

if asserted as an action for damages for wrongful discharge, it was barred by plaintiff's failure to exhaust administrative remedies, since such exhaustion was required by applicable New York State law.

Plaintiffs did not file or seek leave to file an amended complaint but instead appealed from the decision of the District Court.

In its opinion (A. 21-29) the Court of Appeals held that the complaint was sufficient to state a federal claim against petitioners for breach of the duty of fair representation. As to respondent Railroad Company, however, dismissal of the complaint was affirmed both on the ground of exclusive primary jurisdiction of the National Railroad Adjustment Board over plaintiffs' claim of wrongful discharge (A. 24), and the absence of any allegations showing a basis for maintaining the actions under the Interstate Commerce Act (A. 25-26).

The Court of Appeals further held that on remand plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad Company, but that in order to do so they would have to show joint discrimination of the company with the union, that is, a combined attempt to discriminate. Absent such amendment of the complaint, the decision of the Court of Appeals leaves the plaintiffs free to pursue the independent remedies of a court action for damages against the union, and a claim filed with the National Railroad Adjustment Board against the Railroad Company based on its alleged breach of the collective bargaining agreement.

SUMMARY OF ARGUMENT

1. The complaint fails to state a claim against petitioners for unfair representation, and was properly dis-

missed by the District Court. Aside from purely conclusory statements, it does not allege the necessary elements of a claim for unfair representation, as delineated in this Court's opinion in *Vaca* v. *Sipes*, 386 U. S. 171 (1967). Here the only charge asserted against the union defendants was a failure to process grievances on plaintiffs' behalf. This is not sufficient to show unfair representation. Plaintiffs must show in addition that the grievances were meritorious; that the conduct of the union defendants in failing to process them was arbitrary, discriminatory, or in bad faith; and that they either exhausted their administrative remedies or were prevented from doing so.

In this case the complaint fails to allege any facts which would constitute discrimination, arbitrary action, or bad faith on the part of the union defendants, or furnish any basis from which such improper conduct could reasonably be inferred. It does not allege any attempt by plaintiffs to exhaust administrative remedies, nor make any claim that they could not personally press their grievances under the applicable collective bargaining agreement and before the National Railroad Adjustment Board. There is no allegation of any inadequacy of such administrative remedies.

2. The judgment of the Court of Appeals improperly permits plaintiff-respondents to seek recovery from petitioners for damages occasioned solely by respondent Railroad Company's alleged breach of contract and wrongful discharge. It further would permit plaintiffs to pursue their claims simultaneously before two different tribunals, with the possibility of conflicting results or even double recovery for a single wrong. In these respects the ruling below is in direct conflict with the principles enunciated in *Vaca* v. *Sipes, supra.*

3. The decision below would seriously disrupt collective bargaining and the statutory procedures for handling grievances in the railroad industry. Its practical effect would be to compel unions to process all employee grievances, regardless of their merit, placing an unsupportable burden on the statutory administrative procedures for handling such matters, or in the alternative to abandon this area of collective bargaining to individual handling. And the processing of employee breach of contract claims both in the courts and before the National Railroad Adjustment Board would be completely destructive of uniformity of contract interpretation in the railroad industry.

ARGUMENT

I. The complaint fails to state a claim against petitioners for unfair representation.

(a) *Absence of allegations of bad faith, arbitrary action, or hostile discrimination.*

In the recent case of *Vaca* v. *Sipes*, 386 U. S. 171 (1967), this Court had occasion to discuss at length the necessary elements which are required to establish a breach by a union of its duty of fair representation of the members of the collective bargaining unit, in connection with grievances or breach of contract claims which they might have against their employer. In its opinion in that case the Court emphasized that merely showing that the grievance was meritorious and that the union refused to handle it is not sufficient. In addition the employee must show that there was bad faith, arbitrary conduct, or hostile discrimination on the part of the union. (386 U. S., pp. 188-195.)

Even tested by the very liberal standards of federal notice pleading, the complaint in this case clearly fails to state

a claim against the union for violation of its duty of fair representation. Beyond claiming that the union refused to process their grievance, plaintiffs have alleged no facts which would even support an inference of bad faith, arbitrary conduct or hostile discrimination on the part of the union defendants. The complaint merely states the bald conclusion that the failure of petitioners to process claims against the Railroad Company amounted to "gross nonfeasance and hostile discrimination", and an unspecified violation of the terms of "the collective bargaining agreement." (Complaint, paras. Eleventh and Twelfth, A. 6-7.)

The insufficiency of the complaint with respect to the fair representation claim against the union was in fact recognized by the Court of Appeals. In the portion of its opinion dealing with this aspect of the case, it states:

> "The complaint does not make clear the basic reason why plaintiffs are aggrieved . . ." (A. 27; 407 F. (2d), p. 679.)

At the hearing before the Court of Appeals, counsel for plaintiff sought to cure the inadequacy of the complaint by arguing orally, completely *extra* the record, that the union's refusal to handle the grievance was motivated by political considerations. In discussing this contention the Court of Appeals again pointed up the inadequacy of the complaint, saying:

> ". . . we do not think that this basis of the claim can be fairly inferred from the face of the complaint . . ." (A. 28; 407 F. (2d), p. 679.)

Nevertheless, the court below proceeded to ignore the acknowledged insufficiency of the complaint, and attempted to justify reversal of its dismissal by the District Court on the grounds that the defendants might have developed

the nature of plaintiffs' unstated claim by discovery, and that "a plaintiff should be given the opportunity to file supplemental pleadings." (A. 28; 407 F. (2d), p. 679.) But plaintiffs neither sought nor were denied an opportunity to amend their complaint;[*] and we submit that defendants should not be compelled to cure the deficiencies in a complaint which they are entitled to have dismissed under Rule 12 (b) of the Federal Rules of Civil Procedure.

The decision below sharply conflicts with those of other Courts of Appeals on the question of the sufficiency of allegations of bad faith or hostile discrimination in a fair representation case. In *Balowski* v. *International U., United A., A. & A., Imp. Wkrs.*, 372 F. (2d) 829, the Court of Appeals for the Sixth Circuit said:

> "The allegations of a complaint alleging the breach of a Union's duty of fair representation must contain more than 'conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is "hostile discrimination".' Gainey v. Brotherhood of Railway Employees, 313 F. 2d 318, 323 (C. A. 3). '[C]onclusory words * * * without a concomitant showing a lack of good faith [does] not set forth a claim.' Hardcastle v. Western Greyhound Lines, 303 F.

[*] Plaintiffs in fact elected to stand on their complaint as originally filed, and in an affidavit of their counsel filed in opposition to the motions to dismiss took the position "That the plaintiffs do not have to allege facts or damages in their complaint under the Federal Rules." (A. 15.)

> 2d 182, 186 (C. A. 9), cert. denied, 371 U. S. 920, 83 S. Ct. 288, 9 L. Ed. 2d 229. See also Colbert v. Brotherhood of Trainmen, 206 F. 2d 9 (C. A. 9), cert. denied, 346 U. S. 931, 74 S. Ct. 320, 98 L. Ed. 422; Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md.) aff'd 273 F. 2d 614, cert. denied, 363 U. S. 849, 80 S. Ct. 1628, 4 L. Ed. 2d 1732." (372 F. (2d), p. 835.)

Similarly, the Court of Appeals for the Third Circuit set forth requirements of pleading bad faith or hostile discrimination of the union which plaintiffs here clearly failed to meet. In *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, etc., 313 F. (2d) 318, that Court said:

> ". . . The complaint before us must have more than conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravaman of the rule is 'hostile discrimination.' An allegation that certain conduct of the Brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory', without a concomitant identification of lack of good faith, will not set forth a claim sufficient to call for the use of the Steele doctrine." (313 F. (2d), p. 323.)

And in the case of *Slagley* v. *Illinois Central Railroad Company*, 397 F. (2d) 546, the Court of Appeals for the Seventh Circuit said:

> "The pertinent allegations of the complaint are that the O. R. C. & B. compelled I. C. to deprive appellant of his seniority, that this action was 'wrongful, unlawful, and unconstitutional,' 'arbitrary and capricious,' and 'constituted wrongful and unlawful discrimination toward plaintiff,' and that the action breached the collective bargaining agreement and violated the Federal and Indiana Constitutions. We find these allegations insufficient to state a claim for breach of the duty of fair representation. They are mere conclusions of law, plainly insufficient under the Federal Rules of Civil Procedures . . . ." (397 F. (2d), p. 552.)

As we have noted, and as the court below conceded, the complaint in the present case alleged nothing more than the bare conclusion that the union's refusal to process plaintiffs' grievances constituted hostile discrimination. The record is silent as to any facts from which bad faith or a discriminatory motive could be inferred. Absent such bad faith or improper motive, it is clear from this Court's decisions and those of other courts of appeals that plaintiffs have not stated a sufficient claim against the union defendants for violation of the duty of fair representation.

(*b*) *Failure to allege exhaustion of administrative remedies.*

The decision below also fails to recognize and properly apply general principles of exhaustion of administrative remedies and arbitration procedures which this court has formulated in numerous decisions in the labor-management field. That these principles have application in a fair

representation case such as this was made clear in the Court's opinion in *Vaca* v. *Sipes, supra.* As the Court stated, " . . . it is settled that the employee *must at least attempt* to exhaust exclusive grievance and arbitration procedures established by the collective bargaining agreement. Republic Steel Corp v. Maddox, 379 U. S. 650, 13 L. Ed. (2d) 580, 85 S. Ct. 164." (386 U. S., pp. 184-185; emphasis supplied.)

In the instant case there was no showing that plaintiffs had attempted to pursue available administrative remedies individually, after the alleged refusal of the union to process their wrongful discharge claims. It was conceded,[4] and recognized by the Court of Appeals (A. 24, 27), that they could have done so.

The decision of the Court of Appeals on the lack of any duty on the part of plaintiffs to attempt to exhaust their administrative remedies is also in conflict with recent decisions of other Courts of Appeals. The Court of Appeals for the Seventh Circuit, in *Slagley* v. *Illinois Central Railroad Company,* 397 F. (2d) 546, after recognizing the statutory right of individual railroad employees to submit their claims to the National Railroad Adjustment Board [5] (as contrasted with contractual arbitration procedures outside the railroad industry where, as in *Vaca* v. *Sipes,* arbitration is not available unless invoked by the union), stated the rule as follows:

---

[4] In their brief before the Court of Appeals below plaintiffs stated:

"Appellants could conceivably proceed before the National Railroad Adjustment Board on the wrongful discharge issue, but if and when these claims are rejected, the right to seek redress in a judicial forum is lost because of the statute of limitations."

[5] *Elgin, J. & E. R. Co. v Burley,* 325 U. S. 711, 740.

> "However, we need not decide whether the differences between the statutes render the *Maddox-Vaca* principles inapplicable to minor disputes under the Railway Labor Act. To come within the *Maddox-Vaca* exception to the general exhaustion requirement an employee seeking to enforce a collective bargaining agreement must allege that he has attempted to utilize the available contract grievance procedure and that his attempt has been thwarted by union conduct constituting a breach of the duty of fair representation .... Appellant's complaint is plainly insufficient. It contains no allegation that he attempted to use the contract grievance procedures or file his claim with the Adjustment Board." (397 F. (2d), pp. 551-552).

Similarly applying the requirement of exhaustion of remedies, when available, in a fair representation case, is the decision of the Court of Appeals for the Sixth Circuit *Steen* v. *Local Union No.* 163, *United Auto, A. & A. Imp. Wkrs.*, 373 F. (2d) 519. In that case, as here, plaintiff's claim against his union was that it had refused to initiate a grievance on his behalf. In sustaining a dismissal of the complaint, the court said:

> "Plaintiff communicated with the foreman neither verbally nor in writing. He did contact various officials of the local and international unions, but to allow such activity to serve as a substitute for the contractual grievance procedures would be to 'deprive employer and union of the

> ability to establish a uniform and exclusive method for orderly settlement of employee grievances.' Republic Steel Corp. v. Maddox, supra, 379 U. S. at 653, 85 S. Ct. at 617 . . . ." (373 F. (2d), p. 520.)

While according full force and vitality to the doctrine of exhaustion of remedies with respect to plaintiffs' claim against respondent Railroad Company, the Court of Appeals refused to apply it to their claim against the union defendants, apparently because of the complaint's conclusory allegations of "hostile discrimination." (A. 26-27.) In this connection, the Court of Appeals for the Tenth Circuit, in the recent case of *Transport Wkrs. U. of Amer.* v. *Amer. Airlines, Inc.*, 413 F. (2d) 746 (June 24, 1969), said:

> "The futility of the contractual or administrative remedy must clearly appear beyond mere conclusionary language in a complaint, for otherwise the doctrine of exhaustion would be dissipated by mere form and the door to the courts could be opened by prediction rather than by jurisdictional fact." (412 F. (2d), p. 751.)

The Court of Appeals below also sought to justify its refusal to apply the exhaustion of remedies doctrine to the unfair representation charges against the union defendants on the ground that it "does not involve a dispute between 'an employee or group of employees and a carrier or carriers,' 45 U. S. C. Sec. 153 First (i)," and therefore did not fall within the jurisdiction of the National Railroad Adjustment Board. But in an unfair representation case of this type, based on a union's failure to process a grievance or contract claim, it is the employer's alleged breach of contract upon which the controversy turns. As this Court made clear in *Vaca* v. *Sipes*, 386 U. S. 171, the employee plaintiff

in an unfair representation case must at the outset establish that the contract claim which the union refused to handle was in fact a meritorious one, and any ultimate recovery of damages would probably be attributable primarily, if not entirely, to the employer's breach of contract.

The reasoning of the court below on this point would enable a plaintiff to abrogate the doctrine of exhaustion of remedies by selective choice of defendants. But there is no justification for thus limiting that doctrine to a requirement that the only administrative remedies that must be pursued are those which lie against the party chosen as defendant. Plaintiffs' basic grievance against the Railroad Company was one for which they had a full and complete remedy, and could have been made whole, in a proceeding before the National Railroad Adjustment Board.

II. The Court of Appeals erred in permitting this action to be maintained against petitioners while sustaining its dismissal as to respondent Railroad Company.

In holding that the plaintiffs could maintain an action against the union defendants for damages for violation of the duty of fair representation, but could proceed against the Railroad Company on their wrongful discharge claim only before the National Railroad Adjustment Board, the Court of Appeals ignored this Court's holding in *Vaca* v. *Sipes,* 386 U. S. 171, a leading decision on the fair representation principle. In its opinion the *Vaca* case is not cited, referred to or discussed.

In that case an employee, claiming that he had been wrongfully discharged in violation of the collective bargaining agreement, brought suit against the union claiming that it had breached its duty of fair representation by refusing to process his grievance. The employer was not made a

party to the action, and the plaintiff obtained a judgment of compensatory and punitive damages against the union based on the employer's breach of contract. This Court reversed the judgment, and as one of the grounds for reversal held that damages could not be recovered from the union for the employer's breach of contract. The Court said:

> "... Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in *Humphrey* v. *Moore*, supra." (386 U. S., p. 197.)

The decision of the Court of Appeals in the present case stands squarely in conflict with *Vaca* v. *Sipes, supra.* It holds that the plaintiff employees *are* entitled to maintain an action to recover damages solely from the union for "the employer's unrelated breach of contract which triggered the controversy," and that an employer *can* "hide behind the union's wrongful failure to act."

That the complaint here alleged only an "employer's unrelated breach of contract" was recognized by the Court of Appeals when, in its remand order, it permitted plaintiffs to amend their complaint, if they could, to allege complicity between the union defendants and the Railroad Company. Such disposition of the appeal leaves the case in the

anomalous situation where the only way the union can escape the full burden of liability for the employer's breach of contract is for the plaintiff employees to show that the union induced, or conspired to procure, that breach.

This result, and the rationale and holding of the court below, are directly at odds with this Court's decision in *Vaca* v. *Sipes, supra.* As the Court indicated in that portion of the opinion quoted above, the fact that the employer is primarily or totally responsible for plaintiffs' damages makes it essential that the employer be made a party to the action, and the union cannot be made to assume the employer's burden of damages.

Further in clear conflict with the *Vaca* decision is the ruling below to the effect that plaintiffs could proceed separately against the union and the Railroad Company before two different tribunals, the District Court and the National Railroad Adjustment Board. As the Court said:

> "These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate." (386 U. S., p. 188, footnote 12.)

The "impossibility" of these remedy problems is accentuated in the railroad industry by the final and binding, conclusive effect accorded to awards of the National Railroad Adjustment Board. *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257 (1965). The decision of the court below leaves the plaintiffs free to pursue, separately and simultaneously, a court action against petitioners and an administrative proceeding before the Board against respondent Railroad Company. Would the court consider itself bound by a prior Board determination of the breach of

contract issue? Would the Board feel bound to follow a prior court decision on the same issue, in a case to which the railroad was not a party? How could the two separate tribunals accomplish the allocation of damages which this Court, in *Vaca* v. *Sipes*, has said must be made? One thing seems apparent. A union, faced with a judgment for damages in the unfair representation case, would be confronted with insurmountable difficulties in attempting to recover that portion of the damages attributable to the railroad company, if confronted with a final and binding award of the Board to the effect that the company had not breached its contract. The union would indeed be required to pay the employer's share of the damages, a result condemned by this Court in *Vaca* v. *Sipes*.

III. The decision below would seriously disrupt collective bargaining and the handling of grievances in the railroad industry.

Although categorized as "minor disputes," grievances and contract claims of employees constitute the week-in-week out, year-around business of the collective bargaining process. To avoid interruptions to commerce resulting from strikes over such disputes Congress provided, in the Railway Labor Act (45 U. S. C., Sec. 151 et seq.) for a complete system of compulsory arbitration before the National Railroad Adjustment Board, eliminating the strike as a legitimate means of settling these "minor disputes." *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257, *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U. S. 30. The Board's jurisdiction over such disputes is exclusive. (*Slocum* v *Delaware, L. & W. R. Co.*, 339 U. S. 239.)

The effect of the decision below is to open the doors of the courts to litigation over all employee grievances and

contract claims which the union fails or refuses to process, while at the same time leaving the employee free to process the same claim or grievance, simultaneously or consecutively, before the National Railroad Adjustment Board. The court below prescribed no measure of damages or limit upon the recovery which the employees might obtain in their damage action against their union, or in their Adjustment Board proceeding against the Railroad Company. Presumably it contemplated that a full recovery against either or each might be had for whatever damages had been suffered by the employees as a result of the alleged breach of contract by the Railroad Company. And presumably, if the employees should fail to prevail on the merits before one tribunal, they would have a second chance before the other.

On the basis of the holding below, a union can be forced to defend a court action for damages whenever it refuses to process a grievance. As in the instant case, all that must be alleged is that such refusal constituted "hostile discrimination." The disruptive effects of such a rule are aptly described in this Court's opinion in *Vaca* v. *Sipes*, 386 U. S. 171, pp. 191-192. Unions would be compelled either to process all grievances and contract claims of the employees they represent, or to handle none of them, and abandon this large segment of the collective bargaining function to individual handling. Either course would be disastrous, from the point of view of both employer and employees, and the statutory arbitration procedure before the adjustment Board would be so overburdened as to become unworkable.

Similar effects would ensue if, as held below, grievances could be processed twice, before two different tribunals. As the Court of Appeals for the Seventh Circuit said, in

commenting upon this Court's ruling in *Union Pacific Railroad Co.*, v. *Price*, 360 U. S. 601:

> ". . . A contrary holding would make a shambles of the statutory and contractual provisions for the settlement of grievances." (*Stumo* v. *United Air Lines, Inc.*, 382 F. (2d) 780, 786; cert. den. 389 U. S. 1042.)

Finally, the decision below, permitting railroad employees to process breach of contract claims both in the courts and before the National Railroad Adjustment Board, would invite conflicting rulings, both as between different courts throughout the country and as between the Board and the courts. Under the Railway Labor Act collective bargaining agreements have application over the entire system of the carrier, usually traversing numerous judicial districts, and many contracts are national, or industry-wide, in scope. The decision below would critically impair the "desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems" which this Court recognized in *Slocum* v. *Delaware*, L. & W. R. Co., 339 U. S. 239, 243 (1950).

CONCLUSION

In the foregoing discussion we have shown that the complaint herein failed to state a claim against petitioners for unfair representation, lacking adequate allegations with respect to the necessary bad faith, arbitrary action or hostile discrimination, and with respect to exhaustion of administrative remedies. We have further shown that the Court below erred in permitting the action to be maintained against petitioners, while sustaining its dismissal as to respondent Railroad Company on the basis of jurisdiction in the National Railroad Adjustment Board.

The District Court correctly decided these issues in dismissing the action as to all defendants.

Both courts below correctly held that the action could not be maintained on other grounds asserted in the complaint, i. e., a wrongful discharge action with jurisdiction predicated on diversity of citizenship; an action for violation of the Interstate Commerce Act; and an action for violation of the notice requirements of Section 6 of the Railway Labor Act (45 U. S. C., Sec. 156). Plaintiffs-respondents have not sought review of these rulings.

For the foregoing reasons it is submitted that the judgment of the Court of Appeals should be reversed, and the judgment of the District Court, dismissing the complaint, affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS, O'MARA, McCORMICK, PACKARD AND DALY

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Opinions Below

The opinion of the Court of Appeals (A. 21-29) is reported at 407 F. (2d) 674. The decision and order of the District Court (A. 17-20) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered February 24, 1969 (A. 30-31). Rehearing was denied by the Court of Appeals March 18, 1969 (A. 32). The petition for a Writ of Certiorari was filed June 13, 1969 and was

granted October 13, 1969. The jurisdiction of this Court rests on Title 28, United States Code, Section 1245 (1).

Statutes Involved

The statutory provisions principally involved are Section 3 First (i) and (j) of the Railroad Labor Act (45 U. S. C., Section 153 First (i) and (j):

"SECTION 3 FIRST

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person by counsel or by other representatives as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Federal Rules of Civil Procedure

Rule 8

(a) Claims for relief.

A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdic-

tion to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(f) Construction of Pleadings.

All pleadings shall be so construed as to do substantial justice.

Questions Presented

(1) May an action for damages brought by railroad employees against their employer for alleged wrongful discharge and against their union and its representatives for failure to process their claims against the railroad, be dismissed as to the railroad on the ground of exclusive jurisdiction in the National Railroad Adjustment Board, but continue to be maintained as a "fair representation" case against the union in recovery sought solely from it, where the damages claimed stem from the alleged wrongful discharge by the employer in breach of the collective bargaining agreement, independent of any conduct by the union?

(2) May railroad employees maintain an action against their union for failure to process their grievances without exhausting their administrative remedies, when there is now showing that it would have been futile for them to do so, and no claim is made they could not personally press their rights under the collective bargaining agreement and before the National Railroad Adjustment Board?

(3) Is a proper claim for violation of the union's duty of fair representation stated by a complaint which fails to allege any facts which would constitute hostile discrimination by the union, or furnish any basis from which such hostile discrimination could reasonably be inferred?

Statement of the Case

This case is before the Court to review the judgment of the Second Circuit Court of Appeals (A. 30-31) reversing the decision and order of the District Court (A. 17-20) as to the union and further allowing the plaintiffs to amend their complaint against the railroad, to allege that the railroad acted with a motive to discriminate, or acted with knowledge that the union was discriminating against the plaintiffs.

The plaintiffs (named as respondents herein) O'Mara, McCormick, Packard and Daly, are former members of Local 826, System Federation No. 78 and Council No. 2 of the International Brotherhood of Firemen and Oilers. They were originally employed by the Delaware, Lackawanna & Western Railroad as stationary engineers, with their railroad service ranging from forty-nine years to ten years.

In September, 1960, the Interstate Commerce Commission authorized the merger of the Delaware, Lackawanna & Western Railroad with the Erie Railroad.

In June of 1962, these employees were furloughed by the railroad and their positions as stationary engineers were filled by four men formerly holding a laborers' classification with the Erie Railroad.

Those four replacements were all former employees of the Erie Railroad and while belonging to the same parent union, were members of a different local, system and federation.

At a trial of the issues, the plaintiffs are prepared to show that after the merger of the two railroads, the union composed by men from the former Erie Railroad emerged

politically stronger than that of the former Delaware, Lackawanna & Western Railroad and in this case, they in fact discriminated against plaintiffs in allowing their fellow union members to fill the positions of stationary engineers.

Upon not being recalled by the railroad, the furloughed employees contacted the Master Mechanic, one C. E. Maahs and he advised that they were furloughed because of the closing of the Michigan Avenue Power Plant, and that this occurred because of the obsolescence of the facility and their furlough was not a result of the merger.

Thereafter, W. G. Carlson, Chief Mechanical Officer of the Erie Lackawanna Railroad was contacted and it was his decision in letter form to plaintiff's counsel that the employees were not considered as effected employees under the terms of the implementing agreement between the Erie Lackawanna Railroad Company and System Federation No. 78 and System Federation No. 100. The effect of this position was that there was no severance pay due to the furloughed employees.

Fred R. McKernan, General Chairman and Secretary-Treasurer of System Council No. 2, International Brotherhood of Firemen and Oilers, was contacted and he concurred in the stand that the railroad took in this matter and further advised the employees that any further requests by them should be directed to the railroad and not to the union.

Anthony E. Metz, president of the union wrote the plaintiff's counsel indicating that McKerman gave proper information and that the railroad was the proper party to contact relative to any further information.

None of these plaintiffs were ever recalled by the railroad and they have not been employed by the railroad since June, 1962.

A complaint was filed in the District Court joining as defendants certain union officers and the railroad.

A motion to dismiss the complaint was granted by the District Court, finding no basis for Federal jurisdiction.

In its opinion, the Court of Appeals (A. 21-29) held that the complaint was sufficient to state a federal claim against the union for breach of its duty of fair representation and that on remand, the plaintiffs should be granted leave to amend their complaint to state a cause of action against the railroad company.

Summary of Argument

1. The complaint as presently constituted states a claim against the union for breach of its duty of fair representation. A long recitation of the facts was not alleged in the complaint, because it was the opinion of counsel that the Federal Rules of Civil Procedure do not require that facts be pleaded to assert a valid claim. Further, this Court's approach to the criteria with respect to the sufficiency of a complaint as expressed in *Conley v. Gibson,* 355 U. S. 41, is one which is surely applicable.

If the facts of the instant case do not constitute a Federal claim, this can be determined after discovery proceedings, but to allow a dismissal of the complaint against these former employees, bearing in mind what they intend to prove relative to the conduct of its union representatives and the railroad would be highly unequitable.

It is interesting to note that none of the named defendants assert that they are unaware of what the plaintiffs' claims were, nor do they claim surprise.

2. It is further submitted that the permission by the Court of Appeals to amend the complaint against the rail-

road was an exercise of discretion and not unfair and that if the Court sustains the judgment of the Court of Appeals, it is the intention of the plaintiffs to amend said complaint.

3. If the Court does not feel that the complaint as presently constituted is sufficient, then the plaintiffs should be allowed to amend said complaint.

ARGUMENT

I. The complaint states a claim against the petitioners within the Federal Rules of Civil Procedure.

Conley v. Gibson, 355 U. S. 41 (1957) was a case similar to the present matter in that the sufficiency of the complaint was attacked.

In that case, the railroad abolished forty-five jobs held by negroes who were either discharged or demoted as a result of the job abolishment. Their jobs were filled mostly by white employees and by some negroes with a loss of seniority. An action was commenced and this Court stated at 355 U. S. 44:

> "This case involves no dispute between employees and employer, but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated by it in bargaining. The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination."

At 355 U. S. 45, the Court continues:

> "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief."

At 355 U. S. 47 the Court stated:

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that is its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is, and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrates this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8 (f) that 'all pleadings shall be construed as to do substantial justice', we have no doubt that the petitioner complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

While the present matter does not present a racial discrimination question as did *Conley*, the plaintiffs feel that there is a political discrimination question involved.

To have the plaintiffs deprived of the opportunity to litigate the issues because of technical objections is to penalize them harshly.

This Court's approach to the sufficiency of a complaint in *Conley v. Gibson*, 355 U. S. 41 was an equitable and common sense method which was utilized by the Court of Appeals.

Petitioners' reliance on *Vaca v. Sipes,* 386 U. S. 177 in Part I(a) of their Argument as found on page 9 of their brief appears to be misplaced.

According to the standard they would have this Court impose, the plaintiff in a case such as this would have to plead not only his claim, not only all the facts but rather the entire case.

That this position is manifestly contrary to both the letter and the spirit of the Federal Rules of Civil Procedure is evident.

II. It is not necessary that the respondent-employees allege in their complaint that they have exhausted all administrative remedies.

Vaca v. Sipes, 386 U. S. 171 (1967) which is relied on by the petitioners, equally supports the petition of the plaintiffs.

That case involved a class action against the union and its officers based upon wrongful discharge in violation of the collective bargaining agreement. The employee in that matter was fired on grounds of poor health. The union in that case however, unlike the present one, did act. They sent the employee to their own physician and did follow through certain steps of the grievance procedure. The union physician agreed with the company that the employee was not in good health and thereafter, the union decided not to arbitrate.

In this case, the union refused to do anything on behalf of the plaintiffs, union members, and it is submitted, that the motive from which they acted was one of discrimination. In *Vaca v. Sipes,* 386 U. S. 171, 180 the Court stated:

"A primary justification for the preemption doctrine —the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for the purpose—is not applicable to cases involving alleged breach of the union's duty of fair representation."

At 386 U. S. 185, the Court continued:

"It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractural remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge and breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff benefit were it not for the union's breach of a statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances, would, in our opinion be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon union such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such arguments.

For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense upon the failure to exhaust contractural remedies, provided the employee can prove the union as bargaining agent breached his duty of fair representation in its handling of the employees grievance."

In *Glover v. St. Louis-San Francisco Railroad Company*, 89 Supreme Court 548, this Court reviewed a situation in which eight negroes and five white employees sued a railroad and a union in a complaint alleging that the failure

to promote was due to a tacit understanding between the railroad and the union.

The Court indicated at page 550:

"We have held that Section Three First (i) by its own terms applies only to disputes between an employee or group of employees and a carrier or carriers.

The Court has made clear however, that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat the coverall purposes of Federal Labor Relations policy."

"In a line of cases beginning with *Steele v. Louisville & Nashville Railway Co.*, the Court has rejected the contention that employees alleging racial discrimination should be required to submit their controversy to 'a group which is in large part chosen by the defendant against whom their real complaint is made', 323 U. S. at 206.

"The reasons which prompted the Court to hold as it did, about the inadequacy of a remedy before the adjustment board apply with equal force to any remedy administrated by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying."

In a situation where aggrieved employees have as the basis of their complaint political discrimination, rather than racial discrimination, the reasons for not requiring exhaustion of administrative remedies are equally applicable.

Where both defendants have benefited by the furloughing of these plaintiffs, it seems ludicrous to require exhaustion.

The inference by the petitioners that the Court of Appeals ignored *Vaca v. Sipes*, 386 U. S. 171, is not support-

ed by the record because it was cited by plaintiffs' counsel in his brief and discussed by the Court and counsel in oral argument.

III. The Court of Appeals did not commit error in allowing the respondent-employees to amend their complaint against the railroad.

In *Richardson v. Texas & New Orleans Railway Co.*, 242 F. (2d) 230, the Fifth Circuit held that the Federal Courts may grant railway employees ancillary relief against the employer who aids and abets their union in breaching its duty of fair representation, and that the bargaining union has implied statutory obligations to bargain impartially for all and further that the railroad could be required to respond in damages to an injured railroad employee for breach of its own duty not to join in causing or perpetuating a violation of the railway labor act and the policy which it is supposed to effectuate. The Court stated at page 236:

> "It takes two parties to reach an agreement and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they know or should know is unlawful. Unless financial responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy implied under Steele will be impracticable of enforcement. For the foregoing reasons, we think that the Bortherhood's obligations under the statutes does not exist *in vacuo*, unsupported by any commensurate duty on the part of the carrier.
>
> "The railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that under the allegations of this complaint, it can be required to respondent damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy which it is supposed to effectuate."

In order to give the plaintiffs complete relief against all the parties they allege were involved in their job loss, it is only logical that the railroad should remain as a defendant.

This position is best exemplified by the words of Judge Medina in *Cunningham v. Erie Railroad*, 266 F. (2d) 411, 416 (Second Circuit):

> "It would be absurd to require this closely integrated dispute to be cut up into segments."

Conclusion

For the reasons heretofore referred to, it is requested that the judgment of the Court of Appeals be affirmed and that the plaintiffs be allowed to amend their complaint against the railroad. At the least, the plaintiffs should be granted leave to amend their complaint against both the union defendants and the railroad and said complaint should not be dismissed.

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RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

October Term, 1969

No. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY

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IN THE

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No. 234

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY

Questions Presented

1. Should the Supreme Court reverse the Court of Appeals for the Second Circuit and direct that the District Court's order dismissing complaint against all defendants be reinstated on the ground that plaintiffs' only claim is within the exclusive jurisdiction of the National Railroad Adjustment Board and plaintiffs' complaint fails to allege any other claim as against any defendant which the District Court may consider?

2. Alternatively, is there anything in this case requiring the Supreme Court to establish a further exception permit-

ting an employee to sue his Union and employer in the District Court beyond those explicitly mentioned in *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969)?

Statement of the Case

The petitioners' brief (pp. 4-7) contains a concise statement of the case to date. With respect to the plaintiffs' claim against the defendant Railroad, the District Court said:

> Inasmuch as diversity of citizenship clearly is lacking as among the parties, jurisdiction may not be predicated upon that ground. *Treinies v. Sunshine Mining Co.*, 308 U. S. 65, 71 [*sic*] (1939), *American Fire & Cas. Co., vs. Finn*, 341 U. S. 617 [*sic*] (1951). The plaintiffs argue, however, that the action may be sustained either as a suit for wrongful discharge or as a suit based upon hostile discrimination.
>
> Assuming, without deciding, that the complaint may be viewed as a discharge grievance subject to arbitration under the Railway Labor Act (45 U. S. C. §§ 151 *et seq.*), the action would be governed by the principles set forth in *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S. 653 (1953). *Walker v. Southern Ry. Co.*, 385 U. S. 196 (1966). These decisions permit an aggrieved railroad employee to elect to treat his discharge as final without exhausting his administrative remedies when, and only when, diversity jurisdiction exists and such exhaustion is not required under applicable state law. See *Larson v. American Air Lines, Inc.*, 313 F. 2d 599, 602 (2d Cir. 1963); *Walters v. Chicago & Northwestern Ry. Co.*, [*sic*] 216 F. 2d 332, 335-336 (7th Cir. 1954). Here, not only is diversity jurisdiction lacking, but it also seems clear that the New York courts would require exhaustion. See *Pacilio v. Pennsylvania R.R. Co.*, 381 F. 2d 570 (2d Cir. 1967). The complaint does not allege, and

> in opposition to this motion the plaintiffs have not claimed that they have exhausted their administrative remedies. (A. 19-20.)

Although on appeal the Court (A. 28) granted plaintiffs leave to amend their complaint against the Railroad "if they can" allege that it participated in the alleged discrimination by the Union, it basically agreed with the District Court's dismissal (A. 29):

> But dismissal of the employer from this suit will be proper if it appears that its action furloughing the plaintiffs, and the Union's discriminatory refusal to process grievances concerning these furloughs, were not part of a combined attempt to discriminate. In that event plaintiffs' complaint against the Railroad would concern a violation of their rights under the collective bargaining agreement and this, as discussed above, *falls within the exclusive primary jurisdiction of the Adjustment Board.* (Emphasis supplied.)

Summary of Argument

1. There is no jurisdiction in the District Court to entertain plaintiffs' claims against the respondent railroad. The allegations of the complaint, viewed in the most favorable light to plaintiffs, show at best a claim falling within the exclusive primary jurisdiction of the National Railroad Adjustment Board. The District Court properly dismissed the complaint. This should be reinstated. The Second Circuit upheld the District Court on this point but permitted plaintiffs to amend their complaint against the railroad "if they can". Such a gratuitous direction was unnecessary. Accordingly, the District Court's decision should be reinstated.

2. Should plaintiffs be permitted to continue this action—both petitioners—unions and respondent railroad have demonstrated that plaintiffs should not be permitted—

there is no basis for respondent railroad to be a party defendant. There is no claim of hostile discrimination by the Erie Lackawanna. The question whether plaintiffs' being furloughed violated a merger implementing agreement is exclusively one for the National Railroad Adjustment Board, not for the District Court. That part of petitioners' Argument II (pet. brief pp. 17-22) implying that *Vaca v. Sipes*, 386 U. S. 171 (1967), holds plaintiffs' employer-railroad should also be a party if the suit is to continue against the Union is not in accordance with the Court's opinion.

Vaca v. Sipes, supra, involved a case under the L. M. R. A., 29 U. S. C. § 141 *et seq.*, where the Union exclusively controlled the full administrative process which finally determined the employee's claim. It did not involve railroad employment or the National Railroad Adjustment Board. Two cases decided after *Vaca*, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969), and *Slagley v. Illinois Central Railroad Company*, 397 F. 2d 546 (7th Cir. 1968), support respondent Erie Lackawanna's position that it should be dismissed from this action which is allegedly based upon an implementing agreement. Plaintiffs must bring their claim before this specially designed and skilled Railroad Board. They have shown no reason why they didn't or couldn't bring their case to the Board. There is no justification for this case to be in the District Court nor is there any jurisdiction in the District Court.

ARGUMENT

I. The District Court was correct in dismissing plaintiffs' complaint because of the failure to exhaust their administrative remedies and to bring their disputes before the National Railroad Adjustment Board.

The *Railway Labor Act*, 45 U. S. C. Section 151 *et seq.*, sets forth a precise procedure for the handling of so-called minor disputes between railroad employees and their employers.

One of the leading cases interpreting this aspect of the *Railway Labor Act* is *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U. S. 30 (1957). This case involved a strike by a Union after negotiations failed under a collective bargaining agreement. The District Court entered a permanent injunction against the strike upon the ground that the provisions of the *Railway Labor Act* creating a National Adjustment Board shows that they were intended to provide for the determination of minor disputes.

In that case the Union argued that the language "The disputes may be referred by petition of the parties or by either party to the . . . board" meant only that an Adjustment Board has been organized and the parties are free to make use of the procedures if they so desire but there is no compulsion on either side to allow the Board to settle a dispute. The Supreme Court disagreed with this interpretation and held that the Act established a procedure comparable to compulsory arbitration (353 U. S. at p. 34).

The dispute in the present case is a so-called "minor dispute" under the *Railway Labor Act*. The Supreme Court

in the *Chicago River* opinion explained the difference between minor and major disputes:

> The grievances for which redress is sought by the Brotherhood are admittedly "minor disputes" as that phrase is known in the parlance of the Railway Labor Act. These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee, § 2, Sixth. They may be contrasted with "major disputes" which result when there is disagreement in the bargaining process for a new contract. § 2, Seventh. See Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 722-724. (353 U. S. at p. 33.)

Plaintiffs' complaint alleges that they were furloughed following a merger and that such was in contravention of an implementing agreement relative to the merger (A. 6). If any dispute exists, such is of a minor nature within the meaning of the *Railway Labor Act* and plaintiffs must exhaust the remedies under any applicable agreement. If that does not result in a satisfactory disposition, the matter must be referred to the National Railroad Adjustment Board. There would be federal jurisdiction only after the Adjustment Board has made an award in plaintiffs' favor with which the Erie Lackawanna Railroad refuses to comply. *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965); *Pacilio v. Pennsylvania Railroad Company*, 381 F. 2d 570 (2 Cir. 1967). There has been no such award and plaintiffs have not pursued the proper channels for the determination of the alleged dispute.

We do not discuss whether plaintiffs' claims are actually for wrongful discharge. But even if we assume *arguendo* that a wrongful discharge was involved, plaintiffs' claim must fail for the reason that state law is controlling in such cases and unless there is diversity of citizenship, which is lacking here, the Federal Courts have no jurisdiction.

Plaintiffs have relied on the case of *Walker v. Southern Railway Co.*, 385 U. S. 196 (1966) for the proposition that under federal substantive law, plaintiffs may elect to pursue either their administrative remedy or institute an appropriate Court action for money damages based on wrongful discharge. *Walker* was decided on the basis of applicable state law, and if federal substantive law were to apply, the doctrine of exhaustion of administrative remedies as enunciated in *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965), would be controlling. *Pacilio v. Pennsylvania Railroad Company*, 381 F. 2d 570 (2d Cir. 1967).

The doctrine of applicability of state law is clearly enunciated in *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 635 (1953), where the Court said:

> Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the *state courts recognize such a claim.* (Emphasis supplied.) Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover . . .
>
> On the other hand, if the applicable local law, as in Missouri requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, *he must show that he has done so.* (Emphasis supplied.) Here respondent was employed by the carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with the Act. Accordingly, while he was free to resort to the Courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed. (345 U. S. 661-662.)

Walker does not depart from this doctrine, for as the District Court noted, state law was controlling. Specifically, in that case the governing state law required exhaustion of administrative remedies where an employee seeks reinstatement and back pay; however, if that party chooses to accept his discharge as final and makes claim to money damages only, he does not have to allege exhaustion of remedies. *Walker v. Southern Railway Co.*, 237 F. Supp. 278.

It appears well settled in New York State that exhaustion of remedies is a condition precedent to a wrongful discharge action under a collective bargaining agreement. *Pacilio v. Pennsylvania Railroad Company, supra; Larsen v. American Airlines, Inc.*, 313 F. 2d 599 (2d Cir. 1963). Thus, it can be seen that plaintiffs are faced with the requirement of exhausting their administrative remedies under both federal substantive law and New York State Law.

However, plaintiffs have attempted to excuse their failure to comply with federal substantive law, state law and the terms of the collective bargaining agreement by asserting alternatively that they were powerless to individually prosecute their claims under the agreement or that they in fact did exhaust all available administrative remedies. Either position is unsupportable under the facts and law of this case.

"Unlike the situation in *Vaca v. Sipes, supra,* discussed at length in petitioners' brief, which involved a dispute arising under the provisions of the *Labor Management Relations Act,* as amended, Congress has preserved the right of an aggrieved employee covered by the *Railway Labor Act* to participate individually in each step of the grievance

procedure. These rights cannot be nullified merely by agreement between a carrier and a Union. *Elgin, J. & E. R. Co. v. Burley,* 325 U. S. 711, n. 39 p. 740 (1945). The specific right of an individual to pursue his remedies independent from his Union can be found in 45 U. S. C. Section 153 First (j) which reads as follows:

> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Title 45 U. S. C. Section 152 Fourth contains a proviso which again indicates the right of an individual to carry individually his grievance to his employer. This proviso reads as follows:

> . . . [P]rovided, that nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

There is no allegation that plaintiffs have submitted this dispute to the appropriate division of the Adjustment Board. An employee cannot invoke the remedial provisions of the *Railway Labor Act* in the first instance and then abandon that process and resort to the Courts by claiming that he has exhausted all his administrative remedies.

II. Even if the action should be permitted to continue against petitioners' union, the respondent employer-railroad should not be a party.

Respondent agrees with petitioners' basic contention that the District Court was correct in dismissing the complaint as to all the defendants, and joins with petitioners in urging the Court to reinstate the District Court's original order of dismissal. However, respondent cannot agree that it is a necessary party to an action by a group of employees against their union for an alleged breach of the union's duty of fair representation.

Plaintiffs' counsel in his affidavit opposing the motions to dismiss brought by a union and the employer in District Court characterized the complaint as alleging three causes of action—two against the railroad employer and one against their union (A. 15). The Court of Appeals construed both causes of action against the railroad as disputes arising out of an employer-employee contract of a type for which primary jurisdiction has been vested in the Railroad Adjustment Board and not in the Courts (A. 26). It should be noted as to that portion of the complaint which alleged violation of the *Interstate Commerce Act*, 49 U. S. C. § 5 *et seq.*, the Court of Appeals additionally upheld the District Court's dismissal on the basis that it did not give defendants "fair notice" of the basis of plaintiffs' claim under the Act (A. 26). As against the union, the Court of Appeals found the complaint barely sufficient to state a cause of action against it.

In this Court, petitioner-union alternatively implies that a railroad employer is a necessary party to an action by a group of employees against their union based upon a claim of the union's duty to fairly represent them. The thrust of petitioner's argument appears to be grounded on a fear

that it will be exposed to liabilty for damages attributable solely to the employer's unrelated conduct. However, the Court of Appeals made no determination as to the measure of damages to be recovered in this action nor did it suggest that petitioner would be required to assume the burden of damages attributable to the acts of the employer. In fact, inasmuch as the employer's conduct preceded the union's action, damages arising from any wrongful discharge by the employer would not and could not be assessed against the union. *Vaca v. Sipes*, 386 U. S. 171.

In its present state, this action is one for redress against a bargaining unit by members for conduct not related to the railroad's acts. An adjudication of the propriety of the union's conduct does not necessarily require an inquiry into the employer's acts. Indeed, it may well be found that the employer acted correctly but the union did not. Absent an allegation or showing that the union and the employer combined in a scheme to discriminate against the employees the employer's rights and interests will not be affected by the action against the union. *Conley v. Gibson*, 355 U. S. 41.

Petitioner, in implying that the employer is a necessary party to an action against a union under these circumstances, is in effect asking the Court to lay down a rule of law which would frustrate the intent of Congress as enunciated in the *Railway Labor Act*. Such a rule would allow an employee to circumvent the duty to pursue administrative remedies prescribed by Congress in each and every situation where his union refuses to act on his behalf, even though such an employee has the statutory right to individually present his own grievance before the Railroad Adjustment Board. 45 U. S. C. § 153 First (j). Although petitioner argues that *Vaca v. Spes, supra*, man-

dates this conclusion, it becomes apparent from a reading of the Court's opinion in *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969), that *Vaca* did not abrogate the exhaustion of remedies doctrine as set forth in *Republic Steel Corp. v. Maddox*, 379 U. S. 650, and *Walker v. Southern Railway Co.*, 385 U. S. 196.

Vaca did not change the basic rule of exclusive administrative determination. What it did hold, in an L. M. R. A. case where the Union had the sole power to invoke the administrative procedure, is that there are certain situations where the employee may sue in the District Court; otherwise he may be remediless. Thus in *Vaca* the Court stressed:

> "[I]t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U. S., at 185.

Vaca treated two situations in which suit could be brought by the employee: (1) where the employer's course of conduct amounted to a repudiation of the bargaining contract, and (2) where the union has the sole power to invoke the administrative procedures "*and* the employee-plaintiff has been prevented from exhausting his administrative remedies by the union's *wrongful* refusal to process the grievance", 386 U. S. 171, 185 (emphasis by Court). Neither applies in our case.

In *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969), the Court established a third set of circumstances excusing the employee from pursuing the mandated administrative procedure, namely, "where the effort to proceed formally with contractual or administrative remedies would be wholly futile". *Glover* involved a claim of discrimination against the railroad and Brotherhood on the basis of race. In an amendment to their complaint plaintiffs demonstrated the futility of attempting to invoke the administrative procedure or to take the case before the National Railroad Adjustment Board. The Court noted that the claim of racial discrimination was against both the Union and the railroad and, since the Board is in large part chosen by both parties, the plaintiffs in *Glover* should not be required to go to the Board.

In the instant case racial discrimination is not involved nor is there any claim of discrimination by the railroad. The procedures to the National Railroad Adjustment Board have always been open to the plaintiffs. They claim rights under an agreement. All their attorney had to do was file a proceeding before the Board and progress the case.

Our case is much closer to *Slagley v. Illinois Central Railroad Company*, 397 F. 2d 546 (7th Cir. 1968). The plaintiff, a railroad conductor, sued his employer railroad and his unions for compensatory and punitive damages claiming they violated a cooperative agreement relative to his seniority and that their actions were arbitrary, capricious and discriminatory. The District Court dismissed upon the ground that the National Railroad Adjustment Board had exclusive jurisdiction of plaintiff's claims. In the Seventh Circuit the appellant attempted to come under the *Vaca* exception to the general exhaustion requirement.

The Court noted that the *Railway Labor Act* reserves to an aggrieved railroad employee the right to participate at all stages of the adjustment process; that the appellant did not file his claim with the Adjustment Board, and affirmed the order of the District Court on the ground that the Adjustment Board had exclusive jurisdiction.

Any claim against the respondent Erie Lackawanna which plaintiffs have is under an agreement. The statute mandates exclusive jurisdiction in the Adjustment Board. The respondent has the right to have it determined in this tribunal, not in the District Court which has no jurisdiction.

Conclusion

The dismissal of plaintiffs' complaint as against respondent Erie Lackawanna should be sustained. The District Court's decision and order dismissing as against all defendants should be reinstated.

Dated: Buffalo, New York, December 19, 1969.

Respectfully submitted,

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 234.—October Term, 1969

Henry J. Czosek et al., Petitioners, *v.* John R. O'Mara et al.	On Writ of certiorari to the United States Court of Appeals for the Second Circuit.

[February 24, 1970]

Mr. Justice White delivered the opinion of the Court.

In 1960, the corporate respondent, Erie Lackawanna Railroad Company, was formed by the merger of the Erie Railroad and the Delaware, Lackawanna & Western Railroad. Thereafter, the individual respondents, former employees of the Delaware Lackawanna, continued as employees of the Erie Lackawanna until 1962, when they were furloughed; after the 1962 furlough, the respondent employees were never recalled by the railroad. Deeming the furlough a final discharge, the individual respondents brought suit in the District Court for the Western District of New York against the Erie Lackawanna and against the International Brotherhood of Firemen and Oilers, subordinate organizations within the union, and local and national officers of the union. The allegations were that the railroad had wrongfully discharged the plaintiffs in violation of § 5 *et seq.* of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 5 *et seq.*, the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, and the agreement between the Erie Lackawanna and its employees entered into to implement the 1960 merger of the Erie and the Delaware Lackawanna; and that the union defendants had been "guilty of gross nonfeasance and hostile discrimination" in arbitrarily and capriciously refusing to

process the claims of plaintiffs, who had "been replaced by 'premerger' employees of the Erie Railroad." Damages in the sum of $160,000 were sought against the railroad, the union defendants, or both. The District Court dismissed the complaint against the railroad for failure to exhaust administrative remedies under the Railway Labor Act and for lack of diversity jurisdiction; the court dismissed the complaint against the union because the complaint failed adequately to allege a breach of duty and because the employees could have processed their own grievances.

On appeal, the Court of Appeals for the Second Circuit reversed the District Court's decision with respect to the action against the union defendants. *O'Mara* v. *Erie Lackawanna R. Co.*, 407 F. 2d 674 (1969). The Court of Appeals held that the complaint was adequate to allege a breach by the union of its duty of fair representation subject to vindication in the District Court without resort to administrative remedies. Dismissal of the complaint against the railroad was affirmed; but on remand the individual respondents were to be granted leave to maintain their action against the railroad if they should choose to amend their complaint to allege that the employer was somehow implicated in the union's discrimination.

We granted certiorari, 396 U. S. 814 (1969), and we affirm the judgment of the Court of Appeals. Although the complaint was not as specific with regard to union discrimination as might have been desirable, we deem the complaint against the union sufficient to survive a motion to dismiss. As the Court of Appeals indicated, "where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation," complaints should be construed to avoid dismissals and the plaintiff at the very least "should be given the opportunity to file supplemental pleadings unless it

appears 'beyond doubt' that he cannot state a good cause of action." 407 F. 2d, at 679. See *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board nor subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. *Glover* v. *St. Louis-S. F. R. Co.*, 393 U. S. 324 (1969); *Conley* v. *Gibson*, *supra*. The claim against the union defendants for the breach of their duty of fair representation is a discrete claim quite apart from the right of individual employees expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board.[1]

Neither the individual respondents nor the railroad sought review here of the Court of Appeals' judgment insofar as it sustained the dismissal of the complaint against the railroad absent allegations implicating the railroad in the union's claimed breach of duty. The petitioning union defendants, however, challenge this aspect of the Court of Appeals' decision, insisting that they may not be sued alone for breach of duty when the damage to employees had its roots in their discharge

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[1] Section 3 First (i) of the Railway Labor Act, 45 U. S. C. § 153 First (i), authorizes reference to the Adjustment Board of disputes "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." Section 3 First (j) of the Act, 45 U. S. C. § 153 First (j), provides that "[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . . ." The individual employee's rights to participate in the processing of his grievances "are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 740 n. 39 (1945), adhered to on rehearing, 327 U. S. 661 (1946).

by the railroad prior to the union's alleged refusal to process grievances. Apparently fearing that if sued alone they may be forced to pay damages for which the employer is wholly or partly responsible, the petitioners claim error in the Court of Appeals' affirmance of the dismissal of the suit against the railroad. These fears are groundless. The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer was in any other way implicated in the union's alleged discriminatory action.[2] If these allegations are not made and the employer is not a party defendant, judgment against petitioners can in any event be had only for those damages which flowed from their own conduct.[3] Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.

Since the petitioning union defendants will not be materially prejudiced by the possible absence of the respondent railroad as a codefendant at trial and since

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[2] See *Glover* v. *St. Louis-S. F. R. Co.*, 393 U. S. 324 (1969); *Cunningham* v. *Erie R. Co.*, 266 F. 2d 411 (C. A. 2d Cir. 1959); *Richardson* v. *Texas & N. O. R. Co.*, 242 F. 2d 230 (C. A. 5th Cir. 1957). See also *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (C. A. 2d Cir. 1961).

[3] See *Vaca* v. *Sipes*, 386 U. S. 171, 196–198 (1967).

neither the railroad nor the aggrieved employees sought review of the Court of Appeals' judgment, we have no occasion to consider whether under federal law, which governs in cases like these, the employer may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation or whether, as the Court of Appeals held, when there are no allegations tying union and employer together, the union is suable in the District Court for breach of duty but resort must be had to the Adjustment Board for a remedy against the employer.

Affirmed.

THE CHIEF JUSTICE would dismiss the writ of certiorari as improvidently granted.